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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 800, 946, 969

WORLD AIRWAYS, INC., TRANS INTERNATIONAL AIRLINES, INC., SATURN AIRWAYS, INC., PURDUE AERONAUTICS CORP., CAPITOL INTERNATIONAL AIRWAYS, INC., and CIVIL AERONAUTICS BOARD, and AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,

Petitioners,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC. and AMERICAN AIRLINES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

EDWARD R. NEAHER
25 Broadway
New York, New York 10004
Counsel for Respondents

CARL S. ROWE
GERTRUDE S. ROSENTHAL
CHADBOURNE, PARKE, WHITESIDE & WOLFF
New York, New York
Of Counsel

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In the

Supreme Court of the United States

October Term, 1967

Nos. 800, 946, 969

World Airways, Inc., Trans International Airlines, Inc., Saturn Airways, Inc., Purdue Aeronautics Corp., Capitol International Airways, Inc., and Civil Aeronautics Board, and American Society of Travel Agents, Inc.,

Petitioners,

—against—

Pan American World Airways, Inc., Trans World Airlines, Inc. and American Airlines, Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

The questions framed by petitioners avoid the basic question at issue by assuming its answer. That question is not whether the Civil Aeronautics Board ("Board") may authorize "inclusive tour charter service" (C. A. B.

Br., p. 2)[1] or "a type of charter called 'inclusive tour charter' " (ASTA Br., p. 3; Supp. Br., p. 2). Such questions assume that inclusive tours are charters. Since the statute involved—Public Law 87-528 (the "1962 amendment")—speaks of "charter" and not "inclusive tours", the basic question is precisely whether inclusive tours are charters in supplemental air transportation.[2]

Statement of the Case

A. *Introductory Summary.*

At issue here are five orders of the Board awarding supplemental air carriers certificates which authorize them to operate in conjunction with tour operators (travel agents) so-called "inclusive tours" between points in the United States and various foreign points served by respondents (543a-565a, 596a-607a, 1060a-1082a, 1097a-1106a, 1089a-1096a).[3] The orders permit these carriers to derive

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[1] "C. A. B. Br." refers to pages of the Board's brief in No. 946. "Supp. Br." refers to pages of the brief of World Airways, Inc., et al., in No. 800. "ASTA Br." refers to pages of the brief of the American Society of Travel Agents ("ASTA") in No. 949. Numbers in parentheses followed by the suffix "a" refer to pages of Petitioners' Appendix; numbers in brackets followed by the suffix "b" refer to pages of the separate "Appendix to Petitioners' Brief Legislative Materials".

[2] The Court of Appeals answered this question in the negative and hence did not reach the question whether respondents were denied a hearing in connection with the inclusive tour authorizations granted by the Board in the transatlantic area (380 F. 2d 770, 774 (1125a) (2 Cir. 1967)). If this Court sets aside the judgment of the court below, respondents, for the reasons stated *infra*, pp. 73-81, respectfully submit that the Board's orders in the transatlantic area should be set aside because the orders were entered without a hearing.

[3] The term "inclusive tour", as the Court of Appeals noted (380 F. 2d at 771 n. 1 (1121a)), has on occasion been used synonymously

patronage for these tours by individual solicitation and individual ticketing of members of the general public.

The orders in question were issued under the 1962 amendment of the Federal Aviation Act (P. L. 87-528, 76 Stat. 143, 49 U. S. C. §1371(d) and §1301(33)). That amendment expressed a clear-cut Congressional policy decision that supplemental air carriers ("Supplementals") were not to engage in individually ticketed transportation but were to be confined to "charter trips in air transportation . . . to supplement the scheduled service" which regular route carriers such as respondents are authorized to provide (49 U. S. C. §§1371(d), 1301(33)).

The certificates awarded the Supplementals, however, were not so limited; engrafted upon the charter authority in each certificate was the further grant "(including inclusive tour charter authority)" (1083a, 1086a, 1107a, 1113a, 1116a). New regulations adopted as part of the Board's orders made it clear that travel agents who became "tour operators" by contract with the Supplementals would enjoy Board exemption as "indirect air carriers" for the sole purpose of effectuating the inclusive tour authority granted the Supplementals. Respondents accordingly challenged, in the Court of Appeals, the Board's orders and regulations and the certificates issued to the Supplementals, insofar as inclusive tour authority is concerned. That court, after

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with "all-expense" or "package" tours. The Board used the term "inclusive tour" designedly, however, because the Board's orders require only that air and surface transportation (if any) and some hotel accommodations be included in the tour price, which may be as low as 110% of respondents' lowest fare (including discount) applicable between the same points (417a). None of the other land arrangements, meals and sightseeing ordinarily part of an "all-expense" or "package" tour need be included, despite petitioners' contentions here (C. A. B. Br., p. 2 n. 2; Supp. Br., p. 4; ASTA Br., p. 4 and n. 3).

reviewing the legislative history of the 1962 amendment, held that "the Board lacked the power to authorize 'inclusive tours' and that the challenged provisions should be stricken from the certificates awarded to the intervening carriers [Supplementals]" (380 F. 2d at 772 (1121)a)).

B. *The Parties*

Respondents, Pan American World Airways, Inc. ("Pan American"), Trans World Airlines, Inc. ("TWA"), and American Airlines, Inc. ("American"), have been scheduled air carriers for over three decades. Since enactment of the Civil Aeronautics Act in 1938[4] they have been continuously engaged in the transportation of persons, property and mail by aircraft pursuant to certificates of public convenience and necessity issued to them under the Act.

Respondents and other scheduled air carriers alone are authorized by statute to solicit and ticket individual members of the general public for travel in the transatlantic, foreign and overseas areas they are certified to serve (49 U. S. C. §1371). A substantial portion of these carriers' revenue is derived from the sale of all-expense and other tour air travel to the general public through travel agents (728a).[5]

The Supplementals including petitioners in No. 800 are themselves, or are successors to, carriers once known as

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[4] 52 Stat. 977, as amended, 49 U. S. C. §401, now the Federal Aviation Act ("Act").

[5] *E.g.*, approximately 13% of Pan American's passenger revenues in the Pacific area is derived from all-expense tour passengers (35a-36a). As pointed out in ASTA's brief, travel agents promote and sell from 75% to 90% of all international air transportation originating in this country (ASTA Br., p. 3).

"non-scheduled", or "irregular" air carriers. Their authority is derived entirely from the 1962 amendment,[6] which limits them to the performance of charter transportation (and not individual ticketing) that will supplement the service offered by respondents and other scheduled air carriers (49 U. S. C. §§1301(32), (33), 1371(d)(3)). Pursuant to their charter authority (excluding the inclusive tours challenged here) the Supplementals perform extensive services in the air transportation of both persons and property for the military and for commercial and other organizations of all types.[7]

C. *The Orders Set Aside*

The five orders set aside by the court below granted not only charter authority but added "(including inclusive tour charter authority)" in the certificates issued to the Supplementals. The Board's regulations adopted as an integral part of the orders create a class of travel agents ("tour operators") authorized in conjunction with the Supplementals to sell inclusive tours by means of direct solicitation and individual ticketing of the general public. This is done by what is called a "charter" of the aircraft by a Supplemental to the tour operator (although the aircraft

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[6] P. L. 87-528, enacted July 10, 1962, 76 Stat. 143 (*infra*, p. 13).

[7] Their operations in recent years have been very successful. For instance, in the 12 months ending June 30, 1967, World Airways, Inc. had total operating revenues of $57 million, up $19 million from the previous year. Capitol International Airways, Inc. had operating revenues of $33 million. Trans International Airlines, Inc. had operating revenues of $29 million. Saturn Airways, Inc. had operating revenues of $26 million. The operating profit margin of the Supplementals for this period was 15.7%. The operating profit margin of the certificated route air carriers was 11.8% (*C. A. B. Air Carrier Financial Statistics*, June, 1967; *C. A. B. Air Carrier Analytical Charts and Supplemental Carrier Statistics*, June, 1967).

is always under complete control of the Supplemental and operated entirely by its personnel) and the grant by the Board of exemption to the tour operator to act as an indirect air carrier.

As such, the orders violate the terms of the 1962 amendment limiting Supplementals to charter service and the express restriction against their operation of inclusive tours unequivocally set out in the legislative history of that statute. The orders also violate the express terms of the 1962 amendment since they sanction individual ticketing of the general public by Supplementals and thus permit operations which substitute for, and do not "supplement", respondents' services.

The orders set aside arose out of two separate proceedings conducted by the Board: (1) the *Transatlantic Charter Investigation* (Docket 11908) originally commenced in November 1960 and re-opened in April 1964 as *Reopened Transatlantic Charter Investigation* (same Docket 11908), and (2) *The Supplemental Air Service Proceeding* (Docket 13795) instituted in March 1964.

Order No. E-24237 (543a-565a), issued in the *Supplemental* proceeding, and Order No. E-24242 (1097a-1106a), issued in the *Reopened Transatlantic* proceeding, granted new certificates to certain of the Supplementals[8] to engage in "supplemental air transportation (including inclusive tour charter authority)", in foreign and overseas areas served by respondents (566a, 569a, 581a, 587a, 590a).

Order No. E-24240 (1060a-1082a), issued in the *Reopened Transatlantic* proceeding, provided for amendment of the

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[8] American Flyers Airlines Corp.; Trans International Airlines, Inc.; World Airways, Inc.

outstanding final certificates of two Supplementals[9] to add "inclusive tour charter authority" to the charter authority previously granted. That order not only granted inclusive tour authority which was beyond the power of the Board but amended certificates without a hearing in contravention of the Act.

Order No. E-24242 (1097a-1106a) relied on Order No. E-24240 (1060a-1082a) in incorporating inclusive tour authority in the charter certificates issued to additional Supplementals (1100a). The sole basis of both these orders is a previous record completed before the original certificates were granted—and on the basis of which inclusive tour authority had been denied—and "Form 41 reports and other data of which we [the Board] may take official notice", without specification of the portions of the reports and the other data so noticed (Opinion and Orders Nos. E-24240, 24241 (1077a, n. 24)).[10]

Order No. E-24238 (596a-607a), issued in the *Supplemental* proceeding, and Order No. E-24241 (1089a, 1096a), issued in the *Reopened Transatlantic* proceeding, adopted regulations respecting "inclusive tours" previously referred to (*supra*, p. 5; see also *infra*, pp. 37-41).

D. *The Regulatory Problems Created by the Supplementals' Activities Which Necessitated the 1962 Amendment*

The close of World War II brought a substantial number of so-called "nonscheduled", "irregular" or, as known today, "supplemental" air carriers into commercial aviation.

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[9] Capitol Airways, Inc.; Saturn Airways, Inc.

[10] Form 41 reports are detailed accounting reports of operations and of financial condition and investment, filed with the Board monthly, quarterly, semi-annually and annually by each air carrier.

Previously the Board had granted blanket exemptions issued under Section 416(b) of the Act to such non-certificated operators. These relieved those carriers from obtaining certificates of public convenience and necessity and from complying with certain statutory provisions and regulations. The postwar influx of large, transport-type aircraft and flight personnel, however, created enforcement problems arising from the devices employed by the Supplementals to divert passengers from the certificated carriers. The pre-1962 history of the Supplementals reflects their constant endeavor to engage in individually ticketed operations without certification in violation of the Act and the Board's regulations and orders. The Board's efforts to prevent the Supplementals from usurping the functions of the certificated carriers proved largely ineffectual.[11]

Essential to an understanding of the limited authority the Supplementals subsequently derived under the 1962 amendment is a clear picture of the operations they conducted and the authority the Board purported to give them before 1962. That authority, generally speaking, confined them to infrequent and irregular interstate and overseas air transportation of persons and property (and foreign

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[11] The "combine" device cited as a principal abuse in the Board's brief (C. A. B. Br., p. 10 n. 9) was but one of many schemes thought up by these carriers to enable them to conduct the equivalent of certificated operations. Many of these schemes involved the use of ticket selling activities by travel agents and others (see, *e.g., Twentieth Century Airlines, Inc., et al., Compliance Proceeding*, 21 C. A. B. 133, 135, 192-193 (1955), affd. *sub nom. North American Airlines, Inc.* v. *Civil Aeronautics Board*, 240 F. 2d 867, 870 (D. C. Cir. 1958), cert. den. 353 U. S. 941 (1957)); *Large Irregular Air Carrier Investigation*, 28 C. A. B. 224, 464 (1959), affd. *sub nom. Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 294 F. 2d 217 (D. C. Cir. 1960), cert. den. 366 U. S. 965 (1961); *Air America Enforcement Proceeding*, 18 C. A. B. 393, 400 (1954).

air transportation of property only) and planeload charter operations (56a-57a). In granting such authority (later set aside by the courts) the Board "had never authorized inclusive tour authority for the supplementals" (see *American Airlines, Inc.* v. *Civil Aeronautics Board,* 365 F. 2d 939, 946 (D. C. Cir. 1966)). Indeed, as ASTA acknowledges (ASTA Br., p. 9), "[t]he inclusive tour charter concept, whereby a tour operator sells tours utilizing the charter for the to-and-from transportation element of the tour was not then known in the air travel industry in this country" (see also ASTA Br., p. 18; Supp. Br., p. 22).[12] Indeed, the Board's regulations specifically prohibited travel agents from soliciting individual members of the general public (the essential feature of the inclusive tour authority granted by the orders under review).

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[12] Thus there was no "preexisting authority . . . to operate ITCs [inclusive tour charters]," as the District of Columbia Court was led to believe and as ASTA is now trying to convince this Court (ASTA Br., p. 23).

The Board had consistently prohibited travel agents from partaking in the formation of groups and barred public solicitation for the formation of groups for purposes of charter transportation. 16 Fed. Reg. 2700 (1951), 14 CFR § 207.1(a)(2) (1952 Edition); 24 Fed. Reg. 4908 (1959), 14 CFR § 295.11(b) (Supplement to 1956 Edition); 25 Fed. Reg. 5323 (1960), 14 CFR § 295.11(b) (1961 Edition); 26 Fed. Reg. 3631 (1961), 14 CFR § 295.11(b) (1962 Edition); 29 Fed. Reg. 6005 (1964), 14 CFR § 295.11(b) (1966 Edition); 29 Fed. Reg. 13249 (1964), 14 CFR § 207.1 (1966 Edition). This consistent prohibition refutes the Board's contention here that it had "approached the inclusive tour concept" (C. A. B. Br., p. 18 n. 29).

The Supplementals' attempt to equate study groups with inclusive tours is also wide of the mark (Supp. Br., p. 38). So-called "study groups" are not, under the Board's regulations, *ipso facto,* affinity groups which may charter a plane. They are simply exempted *in the transatlantic area* from the affinity rule (14 CFR 295.2(k)). The Board has been very careful to define what a proper study group is (14 CFR 295.2(m)), and it is clear they are not just members of the general public as are purchasers of inclusive tours.

The *Large Irregular Air Carrier Investigation* instituted by the Board (C. A. B. Br., pp. 10-11) failed to resolve the regulatory problems created by the activities of the large irregular carriers and its end results were ultimately declared unlawful by the courts. In that case the Board's Bureau of Air Operations had proposed that the large irregular carriers be limited to charter operations and not permitted to "accept traffic from persons whose business, either directly or indirectly, is the formation of passenger groups from the general public, or the solicitation or sale of individual transportation services" (22 C. A. B. 838, 938 (1955)). The large irregular carriers sought in addition authority for "special-service flights", which the Board's Examiners described as "sales of transportation to individual members of the public on an individual ticket sale or individual waybill basis where the service offered is of a special character distinguishing it from the regularly scheduled services" (*ibid.* at 937).

In their decision of March 29, 1955, the Examiners recommended permitting the large irregular carriers an unlimited number of charter flights and three "special service" flights per month. The Board, however, determined to give these carriers, by exemption, not only charter authority but also individually ticketed or individually-waybilled authority not to exceed 10 trips per month in the same direction between any single pair of points.[18] The Board thought this limited individual ticketing authority would fill the need for special service authority and refused to

[18] The charter authority so conferred was, of course, that which had been long established in air transportation. The "inclusive tour" concept was not employed in the air travel industry as an element of charter, as ASTA and the Supplementals concede (ASTA Br., pp. 9, 18; Supp. Br., p. 22).

grant the latter authority (*ibid.* at 853 and 857; see also 28 C. A. B. 224, 487 (1959)).

It should be noted that throughout the Board proceedings "charter" was used in contradistinction both to "individually-ticketed" authority and to authority to accept traffic "from persons whose business, either directly or indirectly, is the formation of passenger groups from the general public, or the solicitation or sale of individual transportation services" (*ibid.*, p. 938).

The Board's order permitting operations by the Supplementals on an exemption basis was set aside in 1956 in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 235 F. 2d 845 (D. C. Cir. 1956), cert. den. 353 U. S. 905 (1957).

The Court having granted a stay of its order, hearings as to individual carriers then resumed. Meanwhile, the irregular carriers continued their "frequent and regular operations" without authority. In some instances letters of registration were revoked; in others the Board continued issuance of cease and desist orders in a largely unsuccessful effort to keep these carriers from engaging in illegal operations.[14]

Finally, on January 28, 1959, the Board granted certain irregular carriers certificates of public convenience and necessity which included the authority to operate an un-

[14] *United States Overseas Airlines, Inc., Enforcement Proceeding*, Order No. E-9643 (October 11, 1955); *Twentieth Century Airlines, Inc., et al., Compliance Proceeding*, 21 C. A. B. 133 (1955), affd. *sub nom. North American Airlines, Inc.* v. *Civil Aeronautics Board*, 240 F. 2d 867 (D. C. Cir. 1958); *Aero-Peninsular Compliance Case*, 24 C. A. B. 469 (1957); *Hacienda Hotels-Motels, Rooms and Flight Reservations, Inc. and U. S. Aircoach*, 25 C. A. B. 741 (1957).

limited number of charters and no more than 10 scheduled individually ticketed one-way flights per month between any two points (28 C. A. B. 224). This grant of authority was set aside in *United Airlines, Inc.* v. *Civil Aeronautics Board*, 278 F. 2d 446 (D. C. Cir. 1960), vacated *sub nom.*, *All American Airways, Inc.* v. *United Airlines, Inc.*, 364 U. S. 297 (1960), the court holding that certificates of this type could not be lawfully issued.[15]

Just before the decision in *United*, the Board had sought legislation to permit the creation by certificate of a class of "limited service air carriers" (*i.e.*, Supplementals) whose certificates would contain such limitations as were necessary "to assure that the service offered thereunder does not exceed the authorization" (H. R. 7593; see also Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 2d Sess. on H. R. 7593, p. 1).[16]

In view of the decision in *United*, the Board proposed a change in its bill. It now sought legislation which "would have granted the Board the authority which the court held it did not possess and which would have permitted the Board to authorize supplemental operations to continue along the lines of present operations" (H. Rep., p. 6 [32b]; see also Statement by Alan Boyd, Chairman of the Board, S. Hearings, p. 5 [217b], H. Hearings, p. 10

[15] See Supp. Br., p. 4. The Board is, therefore, in error when it contends that "the Board was authorized, as it previously had been, to evolve a definition of 'charter'" (C. A. B. Br., p. 17), insofar as this implies there was any legitimate basis for any of the Supplementals' operations at this time. This Court vacated the *United* judgment for the reason that legislation was being considered by Congress.

[16] The Board had unsuccessfully sought such legislation before.

[207b][17]). The Board did not seek by this legislation, as it now contends, power to authorize a type of operation the Supplementals were not then even trying to conduct.

In order to have time to consider the Board's suggestions Congress, in July 1960, enacted "temporary legislation" to permit the Supplementals to continue their *existing*, and previously held improperly authorized, operations pending hearings on permanent legislation proposed by the Board and the Supplementals (see P. L. 86-661, 74 Stat. 527).

E. *The Legislative History of the 1962 Amendment: Public Law 87-528*

Two months after the close of hearings in the *Transatlantic Charter Investigation* Congress on July 10, 1962 enacted P. L. 87-528, 76 Stat. 143. The measure enacted into law represented Congress' own handiwork and departed significantly from the legislative proposals submitted by the Board and the Supplementals. In summary, it established, for the first time, a legal basis for part of the authority the Board had theretofore attempted to grant to the Supplementals. It did not, however, empower the Board to permit all the activities the Supplementals had been engaged in or all the Board had tried to authorize. It gave "some, but not all, of the authority requested by" the Board (H. Rep., p. 6 [33b]). Basic to the new law was the concept that supplemental air transportation should thenceforth be

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[17] "H. Rep." refers to House Report No. 1177, 87th Congress, 1st Session; "H. Hearings" refers to Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce on Limited Air Carrier Certificates, House of Representatives, 87th Congress, 1st Session; "S. Rep." refers to Senate Report No. 688, 87th Congress, 1st Session; "S. Hearings" refers to Hearings Before the Aviation Subcommittee of the Committee on Commerce on Supplemental Air Carriers, Senate, 87th Congress, 1st Session.

limited to *charter* operations as that term was understood in the aviation field.

The 1962 amendment also recognized that the Supplementals had in the past been permitted by the Board to engage in individually ticketed service. The statute therefore authorized the Board to continue authorizations to provide such service for a two-year phase-out period terminating in July 1964. Thereafter, except under certain unusual temporary conditions, the Supplementals were to be completely separated from air transportation involving individual ticketing of the general public.

1. *The Board's Legislative Proposals*

Following its abortive attempts in the 86th Congress, the Board sought authority from the 87th Congress to issue certificates of public convenience and necessity to the Supplementals containing limitations as to the type and extent of service they might render. Identical bills drafted by the Board were introduced in the Senate and the House (S. 1969 and H. R. 7318). Alan Boyd, Chairman of the Board, made clear the limited scope of the legislation sought. The purpose of the Board's bill was simply "to correct the deficiencies in the Board's legal authority which were found to exist by the court" (H. Hearings, p. 10 [207b]).

The Board's bill proposed the following definition of "supplemental air transportation":

> "(33) 'Supplemental air transportation' means air transportation rendered pursuant to a certificate of public convenience and necessity which contains such limitations as to frequency of service, size or type of equipment, or otherwise, as will assure that the service

so authorized remains supplemental to the service authorized by certificates of public convenience and necessity issued pursuant to Sections 401(d)(1) and (2) of this Act."

The definition was identical to that proposed in the previous session and would have allowed the Board to certify Supplementals to perform on a permanent basis not only charter services but also individually ticketed transportation of the type the temporary legislation by Congress permitted.

Chairman Boyd made it clear that under the Board's bill charter would continue to have the same meaning it then had under the Board's regulations which prohibited sales to individual members of the general public (see Statement by Chairman Boyd to Senate Committee, S. Hearings, p. 26):

"Senator Monroney: They [the supplemental air carriers] would be certificated to fill in the heavy traffic period when seats might not be available on the other American aircraft?.

"Mr. Boyd: That is correct, sir, with the added proviso that *it would be subject to the conditions established by the Board providing for the homogeneity of the charter group*" (emphasis supplied).[18]

Chairman Boyd emphasized that the then-existing Board regulations were designed to prevent travel agents from soliciting the general public (*ibid.*, p. 29):

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[18] Thus the Board did not, as the Supplementals now contend, tell "the House Committtee that supplemental carriers should be granted charter authority . . ., and that the matter of what constituted a charter should be flexible" (Supp. Br., p. 6).

"Mr. Boyd: . . . The regular route carriers have got to be protected. We can't just turn loose completely and permit charters to operate as we see it today on this no-holds-barred basis, because the result would be to put travel agents in the business of soliciting groups at the expense of the regular route operators.

"Senator Monroney: I can well understand that you could, through no-holds-barred on charters, very seriously threaten the integrity of the certificated route structure. Sometimes I question whether we do not go the extreme limits.

* * * * *

"Senator Monroney: With respect to international charters by supplementals can't the Board police those as well as they police domestic charters with respect to travel agents simply manufacturing the charter groups?

"Mr. Boyd: Well, we think we do."

The Supplementals also introduced a bill (H. R. 7512). Clayton L. Burwell, president of the Independent Airlines Association and Supplemental Air Carrier Conference, and attorney here for petitioner Trans International Airlines, Inc., explained to both Houses why the Supplementals sought legislation expressly providing for "unlimited charter operations." He testified that all-expense tours were not charter trips but he stated that the Supplementals sought to broaden the concept of charter in air transportation so as to include all-expense tours (*ibid.*, p. 111):

"Mr. Burwell: . . . it seems to me that it is well worth a look of the committee in the promotion of tourism and so on to take a look at the all-expense tour method of travel.

"Senator Monroney: Would that be on a charter basis, in your estimation?

"Mr. Burwell: I don't think it is technically—well, it is not a charter basis under the present Board rules. *Under the definition that we would like to get it would be.*

"Senator Monroney: What I was getting at, would you recommend that as a charter, a full planeload that would have to go the whole trip, the whole tour, or would you want it on the exemption basis of so many round trips a month, or so?

"Mr. Burwell: We would like to have it as a charter." (Emphasis supplied.)

Chairman Boyd opposed the expanded authority requested by the Supplementals. He explained why in an exchange with Senator Cotton (*ibid.*, p. 36):

"Senator Cotton: What would be your reaction if the bill were to specifically authorize unlimited planeload charter service in addition to giving the Board discretion as to additional types of service?

"In other words, to open the door for charter service and retain the Board's discretion on individual ticketed service and other service.

"Mr. Boyd: I think we would have to oppose that, Senator.

• • • • •

"This term 'unlimited charter service', as we understand it, would create a real monster in that it would permit individuals, presumably travel agents to go out and solicit people, individuals, to join in a group to fly charter instead of taking trips on individual ticketed flights. We think this could have a very dangerous impact on regular route carriers."

It was also in opposition to such "unlimited charter authority", and in favor of giving the Board power to prevent the Supplementals from operating individually ticketed services under the guise of charters, as some had so often tried to do in the past—and not, as petitioners claim, in support of complete flexibility for the Board (*cf.* Supp. Br., pp. 6-10, 44)—that Stuart Tipton, President of the Air Transport Association, made his comments quoted by the Supplementals here. Tipton's concern was that the bill should not tie the Board's hands so that it would be unable to prevent the Supplementals from abusing the charter authority which they would receive pursuant to the proposed legislation. Critical portions of Tipton's comments make this crystal clear (H. Hearings, pp. 239-240):

> "The problem is basically a regulatory one. It is essential to maintain standards of charterworthiness which safeguard against fictitious charters being set up by ticket agents or others who sell individual tickets to the general public. . . .
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> • • • • •
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> "It [H. R. 7512] is unclear and, indeed, dangerous. It fails to incorporate any controls to prevent fictitious charters which would actually entail sale of individual tickets to the general public."

And, as Tipton pointed out to the Senate (S. Hearings, p. 278):

> "The basic guideline being this clear, an appropriate function of the Board is to prescribe regulations, as needed from time to time, to prevent *abuses* through ticket agents, solicitation of the general public, or other devices for conducting individually ticketed op-

erations under the guise of 'charter'. . . ." (Emphasis supplied.)[19]

2. *The Senate Committee's Modification of the Bills Introduced*

The Senate Committee was not satisfied with the Board's bill and proceeded to modify it. "Charter service" was defined in Section 101(13) of the First Print of the Senate Committee's bill as

> "air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property on a time, mileage or trip basis, but shall not include transportation services offered by an air carrier to individual members of the general public or performed by an air carrier under an arrangement with any person who provides or offers to provide transportation of persons to the general public."

Section 401(e) of this print provided, in pertinent part:

> "A certificate issued under this Section to engage in supplemental air transportation shall authorize the carrier to provide charter service and may also authorize the carrier to provide individually-ticketed or waybilled scheduled service."[20]

The Committee drew a clear distinction between "charter" and "individually ticketed" service.

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[19] See also statement quoted at page 9 of ASTA's brief.

[20] Committee Print, S 1969, July 10, 1961.

The definition of charter service appearing in the First Print was modified in the Second Committee Print prepared a few days later.[21] At the end of the definition was added

> ". . ., other than in connection with all-expense-paid tours."[22]

Committee Print Three made no change in this addition but Print Four[23] provided that only a member of a *group* on an all-expense paid tour would be permitted to fly on a charter by changing the language to read:

> ". . ., other than as a member of a group on an all-expense paid tour."

These changes were in substance contained in the final version (Committee Print Five) reported by the Senate Committee.[24]

The Senate Committee bill as reported thus would have expanded the meaning of charter in air transportation so as to permit the Board to authorize all-expense tours by groups as charters. If defined as charters, inclusive tours would then not be subject to another requirement in the Senate bill that no certificate for individually ticketed ser-

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[21] Committee Print No. 2, S 1969, July 14, 1961.

[22] Noteworthy, although petitioners would ignore the distinction (*e.g.*, C. A. B. Br., pp. 6, 12), is that the Senate print referred to "all-expense paid tours" and not "inclusive tours."

[23] Committee Print No. 4, S 1969, July 24, 1961.

[24] Committee Print, S 1969, July 29, 1961.

vices could be issued if it resulted in significant diversion from the scheduled carriers.[25]

The Senate Committee thought that its bill "incorporated the common law definition of charter" and stated in its Report that "an all-expense-paid group tour" could be offered to individual members of the public by a carrier or travel agent and still conform to "the traditional concept of charter". Petitioners emphasize these statements with the implication that according to the Senate Committee Report all-expense-paid tours are included within the meaning of "charter trips" as used in air transportation. The Senate Report, of course, nowhere says that all-expense-paid tours are included within the meaning of charter trips in air transportation. As is apparent from the balance of the legislative history, and, as pointed out more fully below, the exact contrary is the case.

3. *The House Committee's Modifications*

While the Senate bill would have given the Board authority to authorize the Supplementals to engage in all the activities invalidly permitted heretofore and all-expense tours in addition, the House Committee felt that the Board should not even be permitted to authorize all the operations the Board had previously attempted to allow, as the Board

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[25] This history of the development of the Senate bill, and particularly the change in the definition of "charter" after the First Print, completely refutes the argument of the Board here that the Senate only included this proviso in line with its attempt to limit individual ticketing and was not a grant of authority which the Board would otherwise have lacked (see C. A. B. Br., pp. 14-15).

The Board's inclusive tour regulations, in addition to not meeting the requirement of the Senate bill for an all-expense tour, do not meet the added requirement included in the Senate proposal that all-expense tours be sold only to one who is "a member of a group."

was requesting. As its Report pointed out (H. Rep., pp. 6-7 [32b-33b]):

> "The committee is reporting herewith a substitute for H. R. 7318, a bill drafted by the Civil Aeronautics Board to permit the granting of limited certificates to supplemental air carriers, authority which the U. S. Court of Appeals for the District of Columbia has held the Board does not have under existing law. H. R. 7318, *as introduced,* would have granted the Board the authority which the court held it did not possess and *would have permitted the Board to authorize supplemental operations to continue along the lines of present operations.*
>
> "The committee substitute, drafted after careful consideration by the full committee and the Subcommittee on Transportation and Aeronautics, *would give the Board some, but not all, of the authority requested by it.* The committee substitute would establish guidelines for the Board to follow in exercising its authority to certificate supplemental carriers, especially in the field of individually ticketed operations." (Emphasis supplied.)

The House Committee bill thus provided:

> "(33) 'Supplemental air transportation' means *charter trips in air transportation,* other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act." (Emphasis supplied.)

The House Committee bill in addition sharply distinguished between "charter" and "individually ticketed services". It permitted the Supplementals to engage in the latter in two limited circumstances: (1) for a two-year period after enactment the Board could permit the Supplementals to perform certain individually ticketed services in order "to permit an orderly transition to all-charter operations"; and (2) the Board was given authority to issue a special operating authorization to a Supplemental authorizing it to engage in air transportation between two points for a maximum period of 90 days when there is a temporary requirement for such air transportation either because the capacity being offered by certificated air carriers is temporarily insufficient to meet the requirements of the public or the Postal Service or because one or both points is not regularly served by any air carrier. Only in these limited situations would Supplementals be authorized to engage in individually ticketed service.

As explained by the House Committee (H. Rep., pp. 10-11 [41b-42b]):

> "The basic concept written into the substitute bill reported herewith is that the supplementals essentially are charter operators. The committee recognizes that under special circumstances and in temporary situations, individually ticketed supplemental service fills a definite need in our transportation system. The committee recognizes also that individually ticketed supplemental service must necessarily be subject to close scrutiny by the Civil Aeronautics Board to make certain that such service is restricted to supplemental needs and does not provide unfair or discriminatory competition to scheduled carriers, . . ."

Unlike the Senate bill, the House bill did not expand the established meaning of "charter" in air transportation by defining "charter service" to include all-expense paid group tours.

The House Committee "came to the conclusion that under the circumstances, authority to define charter services should be left, as at present, with the Board, *subject to the limitations contained in the reported bill*" (H. Rep., p. 11 [42b]; emphasis supplied).[26] The House thus clearly recognized that the Board's authority to define charter service was limited and did not include the power to change the established meaning and wipe out the distinction between "charter" and "individually ticketed service" expressly recognized in the House bill.

Representative Williams, the Chairman of the Subcommittee, pointed out (108 Cong. Rec. 12322, June 29, 1962 [230b]):

> "The all-expense tours that were provided for in the Senate definition were not accepted by the House, . . ."

Representative Harris, Chairman of the House Committee, explained further (108 Cong. Rec. 12322, June 29, 1962 [230b, 231b]):

> "The Senate proposed to change the well established meaning of 'charter.' The House objected to changing it."

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[26] The italicized words are omitted entirely by ASTA in its summary of the House Committee Report (ASTA Br., p. 24). The House did not, as petitioners would have this Court believe, leave the definition of "charter" entirely to the Board (C. A. B. Br., p. 7; ASTA Br., p. 24; Supp. Br., p. 43). It simply wanted the Board to have sufficient authority to "deal effectively *with any attempt* to *distort* the charter concept" (C. A. B. Br., p. 7; emphasis supplied).

"The law is well established that, in air transportation, charter means essentially the lease of the entire capacity of an aircraft for a period of time or a particular trip, for the transportation of cargo or persons and baggage, on a basis which does not include solicitation of the general public, or any device where individually ticketed services would be offered or performed under guise of charter. The basic concept being thus clear, it is important that the Civil Aeronautics Board, by regulation and other appropriate measures, make sure that charter serves its planeload service concept and is not employed as a subterfuge to perform individually ticketed services. Manifestly, the nature of such subterfuge may change from time to time, and the regulatory agency needs some flexibility to modify its regulations to guard against any new subterfuges that may emerge. For this reason, the House committee objected to any attempt to freeze into the act a definition of charter service which would prevent the Board from dealing effectively with abuses. Thus the bill, as passed by the House, contained no definition of charter."

See also statement of Representative Collier, a manager of the bill (108 Cong. Rec. 12324, June 29, 1962 [232b-233b]).[27]

The House Committee further determined that the Board should include "limitations" in the certificates of the Supplementals so as "to assure that the services are

[27] This is the "identical statement" referred to in the brief of the Supplementals (Supp. Br., pp. 17, 49). The statement was prepared by Chairman Harris (108 Cong. Rec. 12322 [231b]). Representative Collier apparently was so strongly in agreement with the comments of the Chairman of his Committee that he felt compelled to repeat them.

limited to supplemental air transportation" even in the area of the charter operations to which the Supplementals were confined under the House bill (Section 401(e); see also, H. Rep. p. 18 [58b]).

Chairman Harris indicated clearly in describing the Committee bill to the House, as Senator Monroney had indicated to the Senate (107 Cong. Rec. 17163, August 28, 1961), that charter operations and individual ticketed services were two entirely distinct things. He explained (107 Cong. Rec. 20081, September 18, 1961):

> "Under this reported bill, Mr. Speaker, the Civil Aeronautics Board is authorized to issue certificates to supplemental air carriers to conduct, first, charter operations. Second, the Board would be authorized to permit carriers to furnish individual ticketed services on a temporary basis in order to meet certain situations where additional air transportation is needed such as is required for holiday seasons or resort transportation and similar cases."

Representative Williams spoke in a similar vein (107 Cong. Rec. 20082, September 18, 1961).

Chairman Harris made clear that any need for holiday travel, the alleged need met by all-expense tours (see ASTA Br., p. 4), would be met by another provision of the House bill (107 Cong. Rec. 20081, September 18, 1961). Representative Williams explained that the reported bill would (107 Cong. Rec. 20082, September 18, 1961):

> "Second. Permit the Board to authorize the supplementals to provide individually ticketed service on a temporary basis in situations where additional air transportation is needed. These situations, for ex-

ample, would include holiday and vacation travel, and such things as transportation to summer resorts or vacation spots where transportation facilities are deficient."

4. *The Conference Committee's Action*

Because of the conflict in the bills reported to and passed by the respective Houses, a conference became necessary. But there was no time for such action before adjournment. After Congress reconvened, modifications in the legislation were introduced to meet problems of air safety of the Supplementals which had been highlighted by a recent air crash (see ASTA Br., pp. 13, 22).

When the modified legislation was introduced on the floor of the Senate, further discussion ensued about "all-expense tours." Senator Morton, a member of the Senate Subcommittee and a manager of the bill, expressed the first doubts as to all-expense tours before that body (108 Cong. Rec. 3706, March 8, 1962):

> "There is one area in the proposed legislation, however, that raises grave doubts in my mind. This is the grant of power to the CAB to permit the supplemental carriers to carry individually ticketed traffic and all-expense-paid-tour traffic." [28]

The House began consideration of the modified bill a few days later, March 14, 1962 (108 Cong. Rec. 4049). The difficulties that the House had with the Senate bill, particularly with the provision for all-expense tour authority,

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[28] This statement, incidentally, was not made just after the Congress learned that the Bureau of Economic Regulation would seek all-expense tour authority, as ASTA would have this Court believe (ASTA Br., pp. 18, 22), but three months earlier.

were immediately brought out into the open. Representative Walter[29] stated (108 Cong. Rec. 4050, March 14, 1962):

> "The part of the Senate bill which was written last summer, however, still has several undesirable features. The worst of these is the one giving the Board power to grant broad individually ticketed authority to these carriers. That authority has been used by some of the nonskeds ever since the end of World War II. In every year since then—every year, mind you—at least one, and often several, nonskeds have been engaged in regular, continuous, flagrant violation of that authority."
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> • • • • •
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> "The Senate bill also has a definition of charter authority which would let a nonsked carry anyone, anytime—much more than even our main trunklines have authority to do—if only the carriage is part of a so-called all-expense tour. The result would be phony tours in which the only significant item was the air fare...."

Representative Hemphill, a member of the House Committee, also expressed his views on the all-expense tour authority set out in the Senate bill (108 Cong. Rec. 4052, March 14, 1962):

> "It is beyond dispute that the individually ticketed authority which the Senate bill would provide is potentially much broader than the past unenforceable system. Moreover, the Senate would grant the nonskeds the right to carry so-called all-expense-paid tour business. In the past, adequate regulation failed be-

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[29] Representative Walter, moreover, was a proponent, not an opponent, of the final bill (as the Supplementals contend, Supp. Br., p. 48). See 108 Cong. Rec. 12325 (June 29, 1962).

cause it was impossible for the CAB to police each flight conducted by the nonskeds. Under the Senate bill, the CAB would be required to police each passenger to determine whether he was a bona fide all-expense-paid tour passenger. This is clearly less workable than the already proven unworkable system."

The Conference Committee adopted the provisions of the House bill on all matters here relevant, omitting both the Senate Committee's definition of charter and the authority in the Senate bill for the issuance of certificates for other than charter transportation. (See Conference Report, p. 14 [199b-200b]; C. A. B. Br., pp. 7, 17; ASTA Br., pp. 11-12; Supp. Br., p. 14). Also omitted was the Senate provision that certificates authorizing individually ticketed service should be so limited as to prevent significant diversion from scheduled carriers. The Conference Committee Report states that the Conference bill (Conference Report, p. 14)

"adopts the provisions of the House amendment with respect to the prohibition of individually ticketed and waybilled services on a permanent basis."

It also states that after the 2-year period during which individually ticketed services could be continued (*ibid.*)

"supplemental air transportation would be limited to all-charter operations, except for limited individually ticketed service which may be authorized by the Board on a temporary basis."

The Conference Committee Report thus also distinguishes between charter operations and individually ticketed services. And it confirms that, with the exceptions noted, individually ticketed services are prohibited under

the Conference bill. Since inclusive tours are individually ticketed services, they are prohibited by the Conference bill, which is the 1962 amendment.

Senator Monroney, Chairman of the Senate Subcommittee, described the Conference Report as follows (108 Cong. Rec. 12282-12283, June 29, 1962):

> "I regret to have to report to the Senate that the bill as agreed upon in conference departs quite substantially from the economic provisions which the Senate has endorsed on two occasions in passing this bill. The conference report contemplates a supplemental air carrier industry much more limited in terms of its role in air transportation than that which was envisaged by the committee and endorsed by the Senate.
>
> "The conference report adopts the provisions of the House bill limiting the permanent role of these carriers to charter service. The Senate bill had provided that the Board might issue certificates to these carriers permitting them to engage in individually ticketed operations as might be required by public convenience and necessity, but required the Board to impose such limitations on certificates as are necessary to insure that individually ticketed operations did not result in a significant diversion of traffic from the regularly certificated route carriers.
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> "This amendment was included by reason of the diligence of the distinguished Senator from New Hampshire [Mr. Cotton].
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> "I am convinced that the provisions of the Senate bill would have produced a stronger supplemental industry, one better able to serve the needs of the Nation in both peace and war. However, it became apparent

that the only way legislation could be obtained was by accepting the House provision limiting these carriers to charter operations."

Further explanation of the action of the Conference Committee appears in a statement by Senator Cotton, a manager of the bill and member of the Conference and Senate Subcommittees (108 Cong. Rec. 12284, June 29, 1962 [236b]):

"I do wish to comment briefly on one aspect of the conference committee's action. The conferees agreed to drop the language in the Senate bill which defined charter service, and permitted the sale of tickets on charter flights to individual members of the general public who were on all-expense-paid tours. I am wholly in accord with the action in eliminating the all-expense tour provision and thus refusing to confer this power on the Board."

To this Senator Scott, another member of the Senate Subcommittee and of the Conference Committee, added the following (108 Cong. Rec. 12284-12285, June 29, 1962 [237b-238b]):

"The Senate bill proposed to modify the established concept of charter by permitting charters to 'a group on an all-expense-paid tour.' . . .

• • • • •

"The committee of conference wisely eliminated the Senate provision. The bill thus, in effect, confirms the established law as to a charter in air transportation. There should be no question about that. The Congress has considered, and has rejected, a proposal to change the established meaning of charter so as to have per-

mitted travel agent charters for all-expense tours. Such charters have no place in air transportation. . . ."

Respondents do not question that the Senators were aware that the Board was considering the idea of permitting the Supplementals to operate all-expense tours. Senator Thurmond, another Committee member, made this crystal clear (108 Cong. Rec. 12285, June 29, 1962 [239b]).

"I am advised that the CAB Bureau of Economics has advocated that a so-called all-expense tour concept be grafted onto the existing charter definition. This would be intolerable, and has been expressely rejected by the conferees. The Senate receded from its charter definition which included this all-expense tour provision.

"Therefore, I want to emphasize that the CAB must continue its historic charter definition. Any erosion of this concept would defeat the purpose of this supplemental legislation, and would undermine the congressional intent that the supplementals, after the 2-year phasing out period, shall not conduct any individually ticketed business, but, rather, shall concentrate exclusively on full planeload charters.

"Air transportation has suffered from the abuses of individually ticketed operations. The law violations in this area have all too frequently extended to infractions of safety provisions as well. It is for this reason that I want to emphasize the insistence of Congress that supplemental operations shall be confined to full planeload charter operations exclusively."

The Board (C. A. B. Br., p. 21) makes much of Senator Monroney's statement (108 Cong. Rec. 12283, June 29, 1962 [235b]):

"The charter definition contained in the Senate version of the bill was omitted from the bill agreed to by the conferees. This was done unilaterally by the Senate conferees because of the decision which had been made on individually ticketed authority. . . ."

The Board incorrectly implies that by his statement Senator Monroney was saying that the Board had been given a sufficiently wide "latitude in defining charters" so that it could reinstate into the bill the all-expense tours the conferees had just removed. But what the Senator actually seems to have been saying is that all-expense tours were omitted from the Senate bill because they involved individually ticketed authority and the conferees had decided the Supplementals should have no individually ticketed authority.

Moreover, the Board did not quote all that Senator Monroney said. In the sentences immediately following it is clear that the attention of the Senate conferees was focused on the question of permitting the Board to authorize split charters—which, of course, did not involve any individually ticketed authority (108 Cong. Rec. 12283, June 29, 1962 [235b-236b]):

"The charter definition would have operated to prohibit the granting of split charters—that is, the transportation of more than one charter group in a single aircraft. We felt that the Board should be left free to determine on its merits the desirability of permitting the supplemental carriers to conduct such charters, in view of the fact that the charter business will ultimately represent the only source of revenue for these carriers. Another reason why we desired to leave the Board sufficient flexibility so that it might permit split

> charters was the effort of the Defense Department to encourage these carriers to acquire modern turbine-powered equipment for the civil reserve air fleet. The size of such aircraft makes it virtually impossible to find a charter group sufficiently large to fill an entire aircraft."

The flexibility he was referring to was sufficient flexibility to authorize split charters, not to change the meaning of charter to include individually ticketed service.

In view of the crucial importance the issue of authorizing all-expense tours had assumed, and the statements of three Senators on his Committee that such authority was not permitted by the Conference bill, one would have expected Senator Monroney to have expressed his disagreement, if, in fact, he did disagree with that construction. However, in contrast to his statement on split charters, nowhere is there any statement by him suggesting that the Board should be free to determine the desirability of permitting Supplementals to carry all-expense tours.

Senator Scott's explanation of the omission of the definition of "charter" sheds much further light (108 Cong. Rec. 12284, June 29, 1962 [236b-237b]):

> "While the bill thus contemplates only charter services by the supplementals, it does not define 'charter'. It does not need to do so. The act has, since 1938, authorized charter trips by scheduled airlines without regard to the points named in their certificates under Board regulations. The meaning of charter in air transportation has become well established law, and it would have been superfluous to write it into the present bill.
>
> • • • • •

"Another essential element is that the person who charters an airplane cannot resell the space to individuals or solicit the general public to buy space. This is necessary to prevent breakdown of the regulatory system, and most particularly the rate regulatory system. If this were not one of the rules, a travel agent could charter an airplane, and then offer the seats to the general public at less per head than the tariff fares the airplane must observe as to each passenger."

The members of the House Committee were also concerned lest the omission of a charter definition be misunderstood. Representative Williams stated (108 Cong. Rec. 12322, June 29, 1962 [230b]):

"The Senate receded and accepted the position of the House on that provision. So, there is no statutory definition of 'charter' in the bill. That definition will be the one which is presently in effect under a regulation of the Civil Aeronautics Board. The all-expense tours that were provided for in the Senate definition were not accepted by the House and the Senate receded and concurred in our position on that, also."

Chairman Harris, who presented the Conference Report to the House, explained (108 Cong. Rec. 12320, 12321, 12322-12323, June 29, 1962):

"As is well known, the most difficult problem was that of transportation of individually ticketed passengers. The bill as passed by the House last September 18 sought to limit the supplemental carriers to charter operations, with no individually ticketed or individually waybill authority except in certain limited emergency situations.

"Briefly, the supplemental air carrier bill passed by the House proposed to first, authorize the Board to issue certificates to supplemental carriers to conduct charter operations; second, authorize individually ticketed service on a temporary basis for special situations under regulations of the Board; • • • ."

• • • • • •

"The bill agreed to in conference adopts the House provisions prohibiting individually ticketed and individually waybilled services on a permanent basis."

Chairman Harris then went on to point out that the bill as passed by the House contained no definition of charter for the reasons already noted (*supra*, p. 25). He explained why the Senate bill had contained such a definition (108 Cong. Rec. 12323, June 29, 1962 [232b]):

"The Senate bill, on the other hand, contained a definition of charter service. This was necessary, in large part, because *the Senate proposed to modify the established concept of charter in order to permit carriage, as charter, of 'a group on an all-expense paid tour'*. The Senate conferees having receded from insistence *on the all-expense-paid tour exception,* it followed that the remainder of the Senate definition was superfluous since it merely stated established law and policy. (Emphasis supplied.)

• • • • • •

"[T]he bill reported by the conferees contains no definition of charter because the Senate receded. The language the gentleman was concerned about is not in the bill.

"A charter in the aviation field has always meant the engagement of the entire capacity of the aircraft

for a particular purpose by a single engaging party. Travel agents, being agents for transportation services, rather than carriers themselves, have never been allowed to engage airplanes in their own name for their own account. Nor should they be allowed to. That is why the House objected to the proposal of the Senate including the 'all-expense tour' language. As explained in the House report, we felt the Board should be in a position to deal effectively with any efforts to abuse the meaning of charter.

* * * * *

"The Senate conferees having receded from insistence on the all-expense-paid tour exception, it followed that the remainder of the Senate definition was superfluous since it merely stated established law and policy."

Both Houses agreed on this version prohibiting all-expense tours. The final version, as did earlier versions, drew a sharp distinction between "charter" and "individually-ticketed" services. Generally, the Supplementals were limited to charter operations. Individually ticketed travel was permitted only under very limited circumstances, which no one claims to be a basis for the inclusive tour authority granted by the Board.

F. *The Board's Inclusive Tour Regulations*

As noted above (*supra,* p. 7), the Board, in order to effectuate the inclusive tour authority granted the Supplementals, adopted certain regulations (Orders Nos. E-24238, E-24241, 596a-607a, 1089a-1096a). Far from insuring any significant difference between inclusive tours and respondents' individually-ticketed services (Supp. Br., p. 24), the regulations simply highlight how this inclusive tour

authority duplicates such services of respondents. Essentially, the regulations require nothing more than round-trip air transportation, limousine service from the airport to the hotel (surface transportation) and hotel accommodations at the three places (stops) which qualify the trip as a "tour"—all for a price only slightly above the lowest point-to-point air fare of the petitioners.[30] There is no requirement that the "tour" include meals.[31] There is no requirement that the "tour" include sightseeing activities.[32] There is no requirement that the "tour" participants stay at the same hotel.[33] There is no requirement that the participants engage in *any* "group" function. The only time that a tour participant even has to see any of the persons assembled from the general public by the travel agent for this "charter" is on the airplane to and from points of origination and destination.

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[30] Specimen advertising of the Supplementals is set forth in Appendix C. Such advertising shows that the Supplementals have extensively advertised the availability of the low cost transportation to individuals (see Appendix C, pp. C-1, C-2). Indeed, these "tour charters" have been advertised as allowing "individuals to fly at 'organizations' rates . . . at far less cost than before. So much less that Liberty [an agent] tosses in trips to the neighbor islands, superior hotels, sightseeing excursions, parties, even tips" (see Appendix C, p. C-5). And Berry advertises flights on World "at low charter prices," permitting the traveler to "See and do everything and save big money! And still enjoy Berry more-fun-for-your-money extras" (see Appendix C, p. C-3).

[31] Illustrative of "tours" where meals were not included are those approved by Orders Nos. E-23888 (July 1, 1966); E-24041 (August 4, 1966); E-24487 (December 7, 1966); E-24581 (December 29, 1966). See also Appendix C, pp. C-3, C-4, C-5.

[32] Illustrative of tours where sightseeing is optional are those approved by Orders Nos. E-23888 (July 1, 1966); E-24001 (July 22, 1966); E-24038 (August 3, 1966); E-24845 (March 10, 1967).

[33] Often they do not. See, *e.g.*, Appendix C, pp. C-4, C-5.

The seven days minimum for an "inclusive" tour is no restriction, since it is far less than the number of days spent by the average air traveler over respondents' international routes (25a-26a). The regulation minimum of three stops on an inclusive tour again places no meaningful restriction on such travel, since the average traveler on respondents' aircraft visits at least three countries in the transatlantic area and six in the Pacific area (25a-26a, 959a).

The information the Board requires for approval of a tour, *e.g.*, "name of hotel" (Supp. Br., p. 26), provides no significant basis for distinguishing inclusive tours from respondents' services.[34] Other requirements serve no better, many of them having been waived by the Board in practice. For example, the Board has approved an application for a change in itinerary filed a week after the tour *departed*.[35] Surety bond requirements (Supp. Br., p. 27) have often been waived,[36] as has the requirement that a tour application be submitted 90 days in advance.[37]

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[34] The Board obviously will not disapprove an "inclusive tour" because it does not like the name of the hotel. Indeed, it has approved inclusive tours specifying a number of alternative hotels for the same stop. See, *e.g.*, Order No. E-25149 (May 15, 1967), approving application which included brochure annexed hereto as part of Appendix D, page D-1.

[35] See, *e.g.*, Order No. E-25246 (June 2, 1967).

[36] See, *e.g.*, Order No. E-26496 (March 11, 1968); Order Nos. E-24581 (December 29, 1966); Order No. E-24487 (December 7, 1966); Order No. E-26160 (December 21, 1967); Order No. E-24828 (March 7, 1967); Order No. E-25265 (June 7, 1967); Order No. E-24473 (December 2, 1966); Order No. E-25140 (May 12, 1967); Order No. E-25149 (May 5, 1967).

[37] See, *e.g.*, Order No. E-24586 (December 30, 1966); Order No. E-24386 (November 9, 1966).

The suggestion that the Board is strictly policing inclusive tour authority is belied by the fact that 1,250 inclusive tours have been approved since July 1966.[38] The national advertising of the Supplementals, directly appealing to the general public for patronage, and brochures filed in connection with inclusive tour applications show how un-"regimented" (ASTA Br., p. 25) is the travel involved and how it overlaps the very services offered by respondents to the public at large through travel agents.[39] As one brochure for an approved tour put it:

> "About Regimentation—There simply isn't any! You fly as a group, but once you arrive at your destination you do as you please" (Appendix D, p. D-4).[40]

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[38] Annexed as Appendix B is a list of the inclusive tours approved since July 1966.

[39] Appendix D contains sample brochures filed with inclusive tour applications. Illustrative of lack of regimentation is a tour program for two tours to Hawaii, including stops at San Francisco and Las Vegas, jointly offered by Trans International Airlines, one of the petitioners here, and Male Travel Bureau and approved by the Board (Orders Nos. E-23886 (June 30, 1966), E-24001 (July 22, 1966), E-24038 (August 3, 1966), E-24845 (March 10, 1967)). Apart from accommodations and transfers to hotels, all activities are optional; indeed, extra charges are made for just about all of them, including an extra charge for meals not in-flight. Nothing is said about staying at the same hotels; at an extra cost other hotel space is available (Appendix D, pp. D-5, D-7).

A tour application filed jointly by Overseas National Airlines and Male Travel Bureau and approved by the Board (Orders Nos. E-23888 (July 1, 1966), E-24001 (July 22, 1966)) is another illustration. The brochure states "a choice of . . . Sightseeing Available in each city (at additional cost)" (Appendix D, p. D-77). The itinerary provides many leisure days in Las Vegas, Los Angeles, San Francisco and Hawaii with information as to what one might do with the time if one wishes but no more. Meals are not included.

[40] Brochure for tour application filed jointly by Overseas National Airways and American International Travel Service approved by the Board (Order No. E-25149 (April 7, 1967), modified in other respects Order No. E-25245 (June 2, 1967)) (Appendix

The regulations adopted by the Board do not in fact restrict but actually permit widespread solicitation and individual ticketing of the general public in contravention of the intent and purpose of the 1962 amendment (see *infra*, pp. 50-63). As the Court of Appeals held, moreover, they are immaterial to the question of the power Congress gave the Board.

G. *The Decision of the Court Below*

In making its decision that the Board lacked the power to authorize inclusive tours, the Court of Appeals recognized that the District of Columbia Court had reached a diametrically opposite result based on the same statute in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 365 F. 2d 939 (D.C. Cir. 1966), in which an order of the Board relating to the domestic area had been reviewed.

The Court of Appeals considered the contention made by the Supplementals, but not by the Board,[41] that any review was barred by the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U. S. 103 (1948). The court noted that in *Waterman* (380 F.2d at 775 (1128a)):

> ". . . Petitioner did not challenge the regularity of the Board's proceedings and apparently raised no issue as to the Board's statutory authority; instead it attacked the correctness of the Board's findings and the adequacy of the evidence supporting them. . . ."

D, pp. D-1 to D-4). An advertisement for a "tour" under the auspices of these same two companies also emphasizes "Never Any Regimentation" (Appendix C, p. C-4).

[41] As shown *infra*, pp. 82-83, the Board's failure to raise *Waterman* below in connection with the question of statutory power was no mere oversight, but an expression of its view that review was proper.

It held, as had the District of Columbia Circuit before it in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349, 352 (D. C. Cir. 1965), that (380 F.2d at 775 (1128a)):

> "... the *Waterman* case does not 'govern a situation where the action of the Board, before the matter reaches the President, is beyond the Board's power to act.'"

Having decided that question, the court considered carefully the contention that the Board had the power to include inclusive tour authority in the certificates of the Supplementals.

It reviewed the bill as originally proposed and recognized that the scope of the authority finally conferred on the Board was hammered out in the Conference Committee. It considered the Committee Reports on the bills proposed by the House Committee and the Senate Committee.[42] It correctly concluded therefrom that the Senate Committee bill would have *permitted*, but not required, the Board to authorize all-expense tours in charter operations by the Supplementals. It then went on to find that the House Committee bill would not have permitted such inclusive tours. It determined that, in refusing to accept the Senate bill and in accepting the House bill, the Senate conferees receded from the position of the Senate bill permitting inclusive tours and by so doing outlawed such tours as any part of the charter authority which might be granted to Supplementals. It also looked to the uniform statements of the floor managers, which it found were in conformity with the Committee Reports, that inclusive

[42] Indeed the Board recognizes here that the court did not look only to the debates in Congress (C.A.B. Br., p. 5).

tours were not within the authority contemplated by the bill as reported by the Conference Committee (and as finally enacted). In reaching its conclusion that inclusive tour authority was not granted to the Board, the court also recognized, as, indeed, all petitioners do here, the importance to Congress of maintaining the distinction between group and individually ticketed travel.

Petitions for rehearing and rehearing *en banc* filed by all the petitioners here were denied, but a stay of the order of the court below has been granted (1146a-1150a).

SUMMARY OF ARGUMENT

I.

In enacting the 1962 amendment "a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel." That amendment does not even refer to "all-expense tours" or "inclusive tours." Under the statute the Supplementals are limited to "charter trips in air transportation." Since "charter" is not defined in the statute it can only mean what was meant by "charter" in air transportation at the time the statute was amended.

As used in air transportation "charter" did not include all-expense or inclusive tours sold to individual members of the general public by travel agents. The Board's charter regulations had for years prohibited travel agents from soliciting the general public for the Supplementals under the guise of "charter" operations. The Chairman of the Board pointed this out to Congress in testimony on this very bill and said that charters would be subject to the Board's existing regulations as to the homogeneity of the charter group. The Supplementals' principal witness told

the Committee considering the bill that all-expense tours were not charters, but would be under the definition the Supplementals sought (but failed to get). ASTA concedes that the all-expense tour charter concept was not known in air transportation when the 1962 amendment was adopted.

That "charter" as used in air transportation did not include all-expense tours was explicitly confirmed to Congress by managers of the bill in both Houses before it was enacted. As Senator Scott said, the Senate bill with its definition of charter, which the conferees rejected, proposed to "modify the established concept of charter by permitting charters to 'a group on an all-expense-paid tour'." And as the Chairman of the House Committee, Congressman Harris, explained, "in air transportation, charter . . . does not include solicitation of the general public, or any device where individually ticketed services would be offered or performed under guise of charter."

The 1962 amendment excludes the Supplementals from all individually ticketed services except under special temporary circumstances not applicable here and thus precludes inclusive tours which involve such services. Throughout the industry, in the Board's regulations and in the Congressional hearings, both before and during consideration of the 1962 amendment, a definite and clear distinction was drawn between "charter" and "individually ticketed" service. That Congress clearly did not intend that the Supplementals should be authorized to engage in any individually ticketed services pursuant to certificates issued under Section 401(d)(3) of the Act is apparent from an examination of the amendment as a whole. The House bill, which became the law, expressly permitted individual ticketing in only two very limited exceptions, a temporary two-year phasing out period and a special operating au-

thorization for a maximum period of 90 days where there is a temporary inability of scheduled carriers to meet the requirements for service. It is plain that no other individual ticketing was contemplated, as stated in the Conference Report. Since the inclusive tours here involve individually ticketed service they cannot be charters.

Since "charter" does not include all-expense tours—and so obviously not the even less restrictive inclusive tours—the Board is without power to authorize the Supplementals to operate them.

Besides, the Board and the Supplementals recognize that the Supplementals themselves cannot sell inclusive tours. For the Board to authorize them to do this through the medium of travel agents (or "tour operators") is a subterfuge. It is just the kind of charter "device" the Board had warned Congress against and which the Congressional managers of the legislation had assured their fellow Congressmen would be eliminated by the legislation. To permit the Supplementals to sell inclusive tours only if they do so through travel agents is an entirely meaningless condition —by this device the Supplementals are in fact being authorized to operate inclusive tours.

If there could be any doubt what Congress meant when it used the term "charter", it would be dispelled by the legislative history. The final Senate bill would have expressly authorized the Supplementals to operate individually ticketed services, including group all-expense tours. But the Senate bill was rejected by the Conference Committee and the House bill was adopted. On the question of individually ticketed service and all-expense tours, the Senate receded. The Conference Committee Report said that the Conference bill adopted the provisions of the House bill

prohibiting individually ticketed services on a permanent basis.

The adoption of the House bill and the rejection of the Senate bill should by itself be more than sufficient to establish Congressional intent. But the managers of the bill in both Houses left no room for speculation. Senator Cotton referred to the action of the conferees in "eliminating the all-expense tour provision and thus refusing to confer this power on the Board." Senators Scott and Thurmond also expressly stated that the Senate had receded on this point. So did Chairman Harris and Representatives Williams and Collier. All were members of the subcommittees concerned with the legislation; all were members of the Conference Committee; all were managers of the bill. Not a single member of either House expressed any contrary position or disagreement.

The legislative policy decision made by Congress to prohibit inclusive tours cannot be overridden by regulations adopted by the Board. These regulations, in fact, disclose the extent to which the inclusive tours authorized duplicate rather than supplement the individually ticketed services of respondents.

Cases under the Motor Carrier Act relied upon by the Board arise under a different statutory scheme, do not establish the meaning of "charter trips in air transportation" and do not support the Board's position.

While one of the purposes of the 1962 amendment was to aid the economic well-being of the Supplementals this does not override the equally important and specific purpose that Supplementals should be prohibited from operating as "charters" individually ticketed all-expense tours.

II.

The Board amended certificates earlier granted to two Supplementals without holding a hearing, as demanded by respondents here. In so doing, the Board contravened the requirements of the Act and due process. Its action was also in diametric opposition to the decision of this Court in *Delta Airlines, Inc.* v. *Civil Aeronautics Board*, 367 U.S. 136 (1961).

When the Board originally granted the certificates in question, it refused to grant inclusive tour authority to these carriers. In reaching its conclusion to reverse this earlier decision and amend the certificates to include inclusive tour authority, the Board relied on the record on the basis of which it had reached its earlier decision not to grant inclusive tour authority and on officially noticed "Form 41 reports and other data." In granting new certificates to other Supplementals which included inclusive tour authority, the Board similarly relied on such officially noticed data. The Board did not specify the particular data of which it was taking official notice and did not give respondents the opportunity to rebut the implications which the Board drew from this data. This was in violation of the Act, the Board's regulations, the Administrative Procedure Act and the decisions of this Court.

III.

The fact that the President approved the orders set aside below does not bar judicial review of either a question of statutory power or a question of procedural due process, the only issues involved here. *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, cited in this connection, involved only a question of substantial

evidence. That case is, therefore, inapposite. The lower Federal courts have indeed refused to extend *Waterman* to a question of statutory power and both the Department of Justice and the Board have concurred with that construction. Questions of procedural due process involve not only questions of statutory power but constitutional questions, as well, and so should be similarly reviewable.

The Act itself does not bar judicial review of an order involving United States air carriers' foreign operations. The President's approval of the Board's action here arises solely from a statute and as such is subject to judicial review.

ARGUMENT

I.

The Board's orders granting inclusive tour authority to Supplementals involving solicitation and individual ticketing of the general public were correctly set aside as violating the Federal Aviation Act.

In setting aside the Board's orders to the extent they granted inclusive tour authority to the Supplementals, the Court of Appeals noted its agreement with the District of Columbia Court's understanding of the basic purpose of the 1962 amendment. As it said (380 F. 2d at 779 (1135a)):

> "In deciding whether grant of inclusive tour authority violates the limitations of the statute it must be remembered 'that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually

ticketed travel.' American Airlines v. Civil Aeronautics Board, *supra*, 348 F. 2d at 354. See Conference Report, H. R. Rep. No. 1950, 87th Cong., 2d Sess. 14 (1967)."

The Court declared the orders invalid because (*ibid.*):

"To permit the selling of individual tickets to the general public in direct competition with the regularly scheduled airlines, regardless of whether such selling is done through the medium of a travel agent who has first 'chartered' the plane, does violate basic policies of the Act."

The Court thus focused on the essential vice of the authority granted—a vice from which petitioners seek to divert attention by arguing, in effect, that Congress could not have meant what it said about its purpose and intent when it considered and adopted the 1962 amendment.

But nothing advanced by petitioners is sufficient to overcome these facts: (1) the statute on its face makes no provision for "inclusive tour authority"; (2) the meaning of "charter" as used in air transportation does not include inclusive tours; (3) the distinction between "charter trips" and "individually ticketed services" in the statute demonstrates that "charter trips" do not include inclusive tours; and (4) the legislative history manifests an explicit Congressional intent "to forbid the Board to authorize inclusive tours" (380 F. 2d at 781 (1140a)).

A. *The 1962 Amendment Does Not Authorize the Grant of Inclusive Tour Authority to Supplementals.*

1. The statute itself does not authorize the grant of individually ticketed, inclusive tour authority.

(a) *The 1962 Amendment Does Not Even Refer to Inclusive Tours.*

The 1962 amendment does not authorize the Supplementals to operate inclusive tours. Neither "inclusive tours" nor "all-expense-paid tours" are even referred to in the 1962 amendment. The reference to "all-expense-paid tours" that had at one time appeared in the Senate bill was intentionally omitted from the final bill. Since inclusive tours are not mentioned they cannot be authorized by the Board unless they are included in the 1962 amendment by implication.

(b) *"Charter trips in air transportation" Do Not Include Inclusive Tours.*

The 1962 amendment authorizes the Board to issue certificates for "supplemental air transportation". Supplemental air transportation is defined as "charter trips in air transportation * * * to supplement the scheduled service authorized by certificates" issued to airlines such as respondents. Under the terms of the statute, therefore, the Board has no authority to authorize the Supplementals to engage in anything other than "charter trips in air transportation."

There is no definition of "charter trips" in the 1962 amendment. Hence the meaning of "charter trips in air transportation" can only be derived from the established meaning of "charter" in air transportation at the time the 1962 amendment was adopted. There is no question what that meaning was. As the Chairman of the House Com-

mittee, which formulated the version of the 1962 amendment that became law, stated (*supra*, p. 25):

> "The law is well established that, in air transportation, charter means essentially the lease of the entire capacity of an aircraft for a period of time or a particular trip, for the transportation of cargo or persons and baggage, on a basis which does not include solicitation of the general public, or any device where individually ticketed services would be offered or performed under guise of charter."

"Charter" did not include inclusive tours since they were not even known in air transportation at the time of the 1962 amendment. As ASTA has frankly conceded (ASTA Br., p. 9):

> "• • • The inclusive tour charter concept, whereby a tour operator sells tours utilizing the charter for the to-and-from transportation element of the tour, was not then known in the air travel industry in this country"

The Board's charter regulations in effect at the time of the 1962 amendment and for years prior thereto contained provisions prohibiting travel agents from soliciting members of the general public for the Supplementals under the guise of "charter" operations. It was in order to prevent solicitation of the general public in the guise of selling a charter that the Board developed its "affinity" rules holding in effect that there was a charter if the participants have an association separate and apart from the transportation concerned, *e.g.*, if they are members of the same club, since then they are not members of the general public.[48]

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[48] Part 208 of the Board's regulations, even now applicable to the sales of air transportation by Supplementals themselves (437a),

The Board's regulations recognize that "charter" as used in air transportation does not permit a "charter" of aircraft to a person whose business is the formation of groups. They have consistently prohibited this practice. Obviously, were such a practice permitted, the integrity of the charter concept would collapse simply through the interposition of an intermediary.[44]

In Congressional hearings leading up to the 1962 amendment, Board Chairman Boyd had advised that the authority to be given the Supplementals under the Board's bill "would be subject to the conditions established by the Board providing for the homogeneity of the charter group", *i.e.*, the Board's affinity rules.[45]

The principal witness for the Supplementals in the Congressional hearings and one of their attorneys in this case, Clayton L. Burwell, stated that all-expense tours were not charters in air transportation. Asked by Senator Monroney whether the all-expense tour authority he was requesting would be on a charter basis, he replied (*supra*, p. 17):

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specifically prohibits a "solicitation of the general public"; defines that phrase as a solicitation going beyond the "bona fide members of an organization (and their immediate families)"; and defines the last quoted phrase as "members of a charter organization who have not joined the organization merely to participate in the charter as the result of solicitation directed to the general public" (446a-447a; see also 193a). The effect of this prohibition has been completely undercut by the regulations adopted in the orders set aside below.

[44] This practice, which is specifically prohibited in Part 208 of the Board's Regulations (448a), would be encouraged by the regulations adopted in the orders set aside.

[45] S. Hearings, p. 26, *supra*, p. 15.

> "Mr. Burwell: I don't think it is technically—well, it is not a charter basis under the present Board rules. Under the definition that we would like to get it would be."

This fact was specifically confirmed by managers of the bill in both Houses. According to Senator Scott (*supra*, p. 31):

> "The Senate bill proposed to modify the established concept of charter by permitting charters to 'a group on an all-expense-paid tour.' . . ."

In a similar vein Chairman Harris advised the House (*supra*, p. 36):

> "'The Senate proposed to change the well established meaning of 'charter.' The House objected to changing it . . ."

Other Congressmen made similar statements, *supra*, pp. 27, 31, 32, 35.

The Senate Report also recognized including an "all-expense paid tour" would change the meaning of charter as it was used in the air transportation industry.[46] Part of the Senate Report not quoted by the Board says (see S. Rep., p. 13):

> "A charter, by common law and general practice in the transportation industry, means essentially the lease of the entire vehicle, in this case the aircraft, for a period

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[46] The Board would have the Court ignore this distinction altogether (see C. A. B. Br., pp. 7, 18) and therefore suggests that the definition of charter was not really necessary, except insofar as it was designed to prevent individual ticketing "under the guise of charter" (see C. A. B. Br., pp. 14-15, 19).

of time or for a particular trip. Because the development of the charter market has been inhibited by artificial restrictions which have been imposed by Board regulations on a legal charter, particularly in international air transportation, the committee has incorporated the common law definition of charter in the statutory definitions contained in the Federal Aviation Act."

As ASTA says (ASTA Br., p. 21):

> "... the Senate Committee was aware that it would have to define charters legislatively in order to validate ITCs [inclusive tours]."

(c) *The Distinction Between "Charters" and "Individually Ticketed Services" in the 1962 Amendment Demonstrates that "Charters" Do Not Include Inclusive Tours.*

That "charter trips in air transportation" in the 1962 amendment does not include inclusive tours, which, as here, involve individually ticketed service, is also clearly shown by the distinction consistently drawn between charters in air transportation and individually ticketed services. That distinction is recognized by petitioners. For example, ASTA points out (ASTA Br., p. 4):

> "Scheduled carriers are authorized to carry passengers on an individually ticketed or charter basis. Supplemental carriers may carry passengers only on a charter basis."

This distinction also appears throughout the hearings leading up to the 1962 amendment and in its legislative history.[47]

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[47] See *supra*, pp. 8-11, 13-14, 22-24, 29-30. The only exception is the statement in the Senate Committee Report that if a travel

Witnesses and Congressmen repeatedly referred to "charters" on the one hand and "individually ticketed service" on the other.[48]

The 1962 amendment, itself, viewed as a whole makes clear that "charter trips" as used therein could not include the individually ticketed inclusive tour service here involved. The amendment specifically authorized individually ticketed services by Supplementals during a 2-year phase-out period "to permit an orderly transition to an all-charter operation". It also permits the Board to issue special operating authorizations to Supplementals to engage in general air transportation but only when there is a temporary inability of other carriers to meet the requirements for service.[49] This special operating authorization would be valid for not more than 30 days and could be extended for not more than an additional 60 days. These were the only individual ticketing authorizations permitted the Supplementals. The extremely limited power given the Board to authorize indi-

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agent "charters" an aircraft for an all-expense-paid tour and offers to individual members of the public "the right to participate as a member of a group" this is a very different sort of service from individually ticketed transportation. This statement, as did the Senate bill itself, required participation as a member of a "group", a concept not involved in inclusive tours. What is more significant, however, is that this statement is directly contrary to all other statements on the subject made in connection with consideration and passage of the 1962 amendment and is contrary to the distinction made between charters and individually ticketed services in the First Print of the Senate bill. There is, of course, no question that the Senate Committee wanted the Supplementals to be permitted to operate inclusive tours as charters. The fact is, however, that the Senate bill and the Senate position were rejected by the Conference Committee and in the legislation as finally enacted.

[48] See statements, *supra*, pp. 15-18 and 24-26, 28, 30-32, 34-37.

[49] These two provisions of the 1962 Amendments are omitted from the Board's Appendix of the "relevant provisions" of the statute involved.

vidually ticketed services plainly confirms that no other individually ticketed services were to be authorized under the guise of "charter".

It is clear that "charters" did not include individually ticketed services. An operation must be either one or the other. Since inclusive tours of the type here authorized[50] involve solicitation and individual ticketing of members of the general public, they are not charter operations as that term was understood in air transportation at the time the 1962 amendment was adopted.

2. The legislative history of the 1962 Amendment confirms that individually ticketed, inclusive tour authority is not authorized.

The history of the various bills resulting in the 1962 amendment, the Committee reports and all statements made by managers of the bill in both Houses confirm the intent of Congress to prohibit the Board from authorizing Supplementals to operate inclusive tours whose patronage, as here, is derived from soliciting and individually ticketing members of the general public.

The final Senate bill would have expressly authorized the Board to permit the Supplementals to operate, in addition to charters, (1) certain individually ticketed services and (2) group all-expense-paid tours. The bill would have done the latter by adding to the definition of "charter" a provision that charter included "transportation services offered by an air carrier to individual members of the gen-

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[50] Not involved here are all-expense tours provided in proper charters, such as those charters operated by both the Supplementals and respondents for business and social organizations. Respondents have never questioned the validity of charters for tours that do not involve solicitation and individual ticketing of the general public.

eral public * * * as a member of a group on an all-expense-paid tour".

But the Senate bill was not adopted. The Conference Committee rejected it and recommended the House bill, which contained no such definition of "charter" and would not have permitted the Supplementals to operate any permanent individually ticketed services. On the question of individually ticketed service and all-expense tours, the Senate "receded", as was made clear in the Conference Committee report, and in statements by managers of the bill in both Houses.[51]

The Conference Committee adopted the provisions of the House bill on all matters here relevant, omitting both the Senate Committee's definition of charter and the authority in the Senate bill for the issuance of certificates for other than charter transportation. The Conference Committee Report states that the Conference bill "adopts the provisions of the House amendment with respect to the prohibition of individually ticketed and waybilled services on a permanent basis." It also states that after the 2-year period during which individually ticketed services could be continued "supplemental air transportation would be limited to all-charter operations, except for limited individually ticketed service which may be authorized by the Board on a temporary basis."

The Conference Committee Report thus also distinguishes between charter operations and individually ticketed services. And it confirms that individually ticketed services are prohibited under the Conference bill.

The statements made not by one but by six managers of the bill, statements made both in the House and in the

[51] See *supra*, pp. 29-32, 35-37.

Senate, expressly and unequivocally confirm what is clearly implicit in the 1962 amendment itself, its legislative development and the Committee reports. The six managers of the bill who spoke on this subject stated expressly that the Board was not given the power to authorize the Supplementals to engage in all-expense tours (and *a fortiori*, not inclusive tours). Senator Cotton referred to the action of the conferees in "eliminating the all-expense tour provision and thus refusing to confer this power on the Board." Senators Scott and Thurmond also expressly stated that the Senate had receded on this point. So did Chairman Harris and Representatives Williams and Collier.[52]

Petitioners, recognizing that statements by the managers of the bill in both Houses unequivocally support respondents' position,[53] urge the Court in effect to ignore these statements.[54] They argue that these statements must be disregarded since they (1) contradict the Committee Reports (ASTA Br., pp. 24, 25; Supp. Br., p. 32); (2) are by opponents of the bill (Supp. Br., p. 32); (3) represent the views of only six members (ASTA Br., p. 23); (4) are simply "planted" statements entitled to no weight whatever (Supp. Br., pp. 33, 49); and (5) arise in an area where there are strong conflicting economic interests (Supp. Br., p. 47).

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[52] See *supra*, pp. 25, 31-32, 35-36, for their statements on this point.

[53] See, *e.g.*, ASTA's assertion that the "floor speeches . . . were *intended* to have that effect", *i.e.*, to "establish a statutory guideline which prevents the Board from defining charter so as to include I.T.C. [inclusive tour charters]" (ASTA Br., p. 20).

[54] The Board and the Supplementals recognize that statements by those in charge of a bill cannot be entirely ignored, but contend they cannot be given the same weight as Committee Reports (C. A. B. Br., p. 21; Supp. Br., p. 49). They then give no weight whatever to the statements by the bill managers.

(1) It is perfectly clear that the statements of the managers of the bill do not contradict the Committee Reports and the statute, since the Committee Reports and the statute do not support petitioners' position here, as we have shown (pp. 13-14, 21-24, 26, 29-30).

(2) The debates quoted here, *supra*, pp. 24-37, and relied upon by the court below constitute all of the statements made by *managers*[55] of the bill regarding all-expense tour charters. The Congressmen making them were not casual debaters; nor were they "opponents" of the bill; they were *principals* in the entire legislative process. As indicated, in Appendix A to this brief, Mr. Oren Harris was the *Chairman* of the House Committee on Interstate and Foreign Commerce. Mr. John Bell Williams was the *Chairman* of the Subcommittee on Transportation and Aeronautics. It was he who *presided* at the House hearings at which appeared representatives of petitioners and respondents. Mr. Collier was also a member of that Subcommittee. Senators Scott, Thurmond and Cotton were all members of the Subcommittee on Aviation of the Senate Committee on Commerce before which the Senate hearings were held, and in which all three Senators particularly participated. All six of these Congressmen were also members of the Conference Committee.

(3) The fact that only six of the 17 members of the Conference Committee spoke on the subject of all-expense tours does not make this a minority view. Surely, if

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[55] The Supplementals scorn the respondents' and the court's use of the word "managers" (Supp. Br., p. 51), but that is precisely what these Congressmen were deemed to be by the Congress at the time the 1962 Amendment was enacted (see 108 Cong. Rec. 12318, June 29, 1962).

others disagreed, they could and would have so stated. There was certainly no need for every member of the Committee to state again what had just been said by others.

(4) There is, of course, not one scrap of evidence to indicate that the floor statements were "planted". Chairman Harris, for one, expressly stated that he prepared his own statement (108 Cong. Rec. 12322, June 29, 1962 [231b]). We do not believe even petitioners are suggesting that the statements did not really represent the views of the Congressmen making them.

(5) That there may be economic conflict is irrelevant. This Court has often relied on Congressional debate in cases involving great economic conflict. In *United States* v. *Third National Bank of Nashville* (Slip Op. No. 86, October Term 1967), 36 U. S. L. Week 4178, 4182 (March 4, 1968), a bank merger case arising under Section 7 of the Clayton Act, this Court looked not only to "the language of the Act but . . . the statements of those who supported it while the Act was under consideration."

Statements by members of Congress were also considered by this Court in *Case Swane Co.* v. *Sunkist Growers, Inc.* (Slip Op. No. 66, Oct. Term, 1967), 36 U. S. L. Week 4071 (December 18, 1967); *The Colony, Inc.* v. *Commissioner of Internal Revenue,* 357 U. S. 28 (1958); *First National Bank* v. *Walker Bank & Trust Co.,* 385 U. S. 252 (1966); *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 312-323 (1962); *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *National Labor Relations Board,* 365 U. S. 667 (1961); *National Labor Relations Board* v. *Insurance Agents International Union,* 361 U. S. 477 (1960); *Mitchell*

v. *Kentucky Finance Co.*, 359 U. S. 290 (1959); *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270 (1955).[56]

Petitioners, seeking to avoid the effect of the unequivocal statements by the sponsors of the 1962 amendment, attempt to make much of the definition of "charter service" in the Senate bill which included an "all-expense-paid tour" and the statement in the Senate Committee report that this would "conform to the traditional concept of charter" (C. A., B. Br., pp. 13, 18; Supp. Br., pp. 12, 44). In the first place, in the first print of the Senate bill all-expense tours were not included in the definition of charter and were clearly excluded by the prohibition against sales to

[56] The cases cited by petitioners in support of their proposition that "casual and scattered remarks emanating from one side or the other in the course of debate on a statute representing legislative compromise and accommodation between strong economic forces in vigorous conflict" (Supp. Br., p. 47) are of no aid to them here. Indeed, *National Labor Relations Board* v. *Allis Chalmers Mfg. Co.*, 388 U. S. 175 (1967), and *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U. S. 612 (1967), made extensive use of Congressional debate (388 U. S. 185-192, 386 U. S. 633 n. 21). In *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U. S. 58 (1964), this Court recognized that it should look to the "sponsors . . . when the meaning of the statutory words is in doubt" (377 U. S. 66), and cited *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), where the author of the majority opinion, Mr. Justice Douglas, resorted to floor debates to determine legislative intent, stating that courts may look to "what the sponsors wrote and said" (341 U. S. 395; see also 341 U. S. 394). And in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110 (1942), this Court did look to statements "on the floor of the Senate and the House" (315 U. S. 125). In *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921), this Court did not look only to Committee Reports, but also "explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage" (254 U. S. 475). *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1 (1968), is a different case entirely. There this Court rejected the interpretation espoused by persons who had sought a more restrictive wording in the statute and who had lost.

individual members of the general public. So at that time they were not considered charters for the purposes of the Federal Aviation Act even by the Senate Committee.

Secondly, while an exception was written into later drafts of the Senate bill, authorizing the Board to permit[57] the Supplementals to offer transportation to "members of a group on an all-expense-paid tour", the Senate bill was not adopted; the Senate receded on the definition of charter service and specifically on the inclusion of all-expense tours. Thirdly, the traditional concept of charter to which the Senate report referred could have reference only to the concept used in surface transportation. Even the petitioners concede that the concept of all-expense tour charters did not exist in air transportation at this time (*supra*, p. 9). Moreover, the Senate was told by the managers of the bill that the Senate bill proposed to modify, whereas the Conference bill which was adopted would confirm, "the established law as to a charter in air transportation," (*supra*, p. 31).

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[57] The report of the Senate Committee makes it clear that contrary to petitioners' flat assertions (*e.g.*, C. A. B. Br., pp. 7, 19; ASTA Br., pp. 11, 18, 21), the Senate bill would not have *required* the Board to authorize each or any Supplemental to operate all-expense tours (S. Rep. p. 13 [119b]):

> "Because the committee is convinced that individual certificates as a supplemental air carrier must be tailored to the public need and to the capability and interests of the particular carrier, *the bill does not require the Board to grant every supplemental carrier any particular charter authority.* The Board is specifically authorized to designate the geographical area or areas within or between which charter service may be rendered. *The charter authority of one carrier may be quite different from that provided to another. . . .*" (Emphasis supplied.)

The Board's sweeping grant of blanket inclusive tour authority in the certificates involved in the present orders simply highlights the Board's disregard of another limitation that the Senate wished to impose.

Finally, inclusive tours, of the type here involved, do not conform to the traditional concept of charter in surface transportation. As we point out below (*infra*, pp. 68-71), these inclusive tours are not comparable to the type of all-expense tours authorized as charters under the Motor Carrier Act.

3. The use of travel agents does not transform inclusive tours into charters.

The Board and the Supplementals concede that the Supplementals themselves cannot sell inclusive tours (Order No. 23350, 345a-346a). The direct sale of inclusive tours would clearly not constitute "charter trips in air transportation" which the Board could authorize them to operate. The interposition of a travel agent as a middleman does not change the substance of the operation in any way. Under the Supplementals' existing inclusive tour authority members of the general public are being solicited and individually ticketed by the Supplementals, often directly, as shown in Appendices C and D.

One of the principal abuses the Board had to cope with in the earlier days of operations by "non-scheduled" or "irregular" carriers was the attempted use by these carriers of various devices, including sales through agents, to circumvent the law and the Board's regulations (see *supra*, p. 8). Because of this past experience the Board had adopted regulations preventing travel agents from soliciting the general public and the Chairman of the Board warned the Senate Committee against authorizing charters that would "put travel agents in the business of soliciting groups at the expense of the regular route operators" (see *supra*, p. 16). In addition, Congress was told by managers of the 1962 amendment that an air transportation charter

"does not include solicitation of the general public, or any device where individually ticketed services could be offered or performed under guise of charter" and was warned to make sure that charters are "not employed as a subterfuge to perform individually ticketed services" (*supra,* p. 25).

To permit the Board to authorize Supplementals to operate inclusive tours through travel agents would be to permit them to do indirectly and through a subterfuge what they clearly could not do directly. It is just the kind of charter "device" that Congress was warned against and that Congress was assured by managers of the bill would not be permitted by the 1962 amendment. Most of the all-expense tours sold to individual members of the general public on the scheduled services of respondents are sold through travel agents (see ASTA Br., p. 3). If the Supplementals could sell inclusive tours directly they would also use the services of travel agents. Consequently, it is meaningless for the petitioners to argue, as they apparently do here, that while the Board cannot authorize the Supplementals to sell inclusive tours without the services of travel agents, they can do so if the services of the travel agents are used.

In spite of the use of the charter "device" the inclusive tour authority authorized by the Board is individually ticketed service and not "charter trips in air transportation" and is therefore invalid under the 1962 amendment.[58]

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[58] Utterly devoid of merit is the Supplementals' contention that the decision of the court below will "have an adverse effect on the balance of payments problem", since foreign Supplementals will be permitted to carry inclusive tours while domestic Supplementals will not (Supp. Br., pp. 33, 53-54). The Board has the authority under section 402 of the Act to modify the certificates of the foreign carriers so as to prevent the kind of imbalance the Supplementals fear. This is pointed up by a very recent order of the Board in

B. *The Board Cannot by Regulation Override the Limitations Intended by Congress.*

Having lost the battle in Congress, the Supplementals and now the Board have sought to bring about inclusive tour authority by administrative fiat. But since Congress did not give the Board power to authorize inclusive tours, the Board does not have such power even if, as petitioners allege, its regulations would effectively control the abuses that Congress feared might arise by the exercise of such power.[59] This Court has often recognized that the motive of Congress "so long as Congress acts in pursuance of its constitutional power" is irrelevant. *Barenblatt* v. *United States,* 360 U.S. 109, 132 (1959).

Petitioners nonetheless insist that the Board, by regulation, has corrected the abuses about which Congress was concerned when it withheld from the Board power to authorize inclusive tours and so has "justified" its assumption of power to grant inclusive tour authority. But to hold thus would be to permit the Board to expand the scope of its statutory power, which it clearly cannot do. To justify the *existence* of power by reliance upon regula-

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which it directed a foreign air carrier to show cause why an "imbalance between that carrier and a United States carrier should not be redressed by modifying the certificate of the foreign carrier" (Order No. E-25823 (October 11, 1967)). Indeed, just the other day, the Board recognized this right in granting inclusive tour authority to a foreign carrier. In *Lloyd International Airways Ltd.,* Order No. E-26616 (April 5, 1968), the Board stated (pp. 3-4):

> ". . . if the Board's position as to its authority with regard to the American carriers is not upheld, there will be ample opportunity thereafter to consider whether revision of Lloyd's permit is required."

[59] Indeed, the regulations adopted simply demonstrate that the inclusive tours authorized permit the Supplementals to duplicate the individually ticketed services offered by respondents (*supra,* pp. 37-41).

tions adopted to control the *exercise* of that power, such as the Board suggests here (C. A. B., Br. p. 27), would mean that power would exist or not depending on the particular regulations adopted by the Board, an altogether untenable suggestion.

Of course, Congress had the power to prohibit inclusive tours on the basis of abuses that it thought might occur. And the Board cannot limit that power by finding such abuses would not in fact occur. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

Respondents do not question that the "construction put on a statute by an agency charged with administering it is entitled to deference by the courts" *Volkswagenwerk* v. *Federal Maritime Commission* (Slip Op. No. 69, October Term 1967), 36 U.S.L. Week 4197 (March 6, 1968). However, as this Court pointed out in *Volkswagenwerk* (Slip Op., p. 10):

> "the courts are the final authorities on issues of statutory construction." [60]

The question of inclusive tour authority is a major policy decision which the Board may not assume to make (H. Rep., p. 22 [66b]).[61] This Court, in exercising its right to review

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[60] See also *Stark* v. *Wickard*, 321 U.S. 288 (1944); *National Labor Relations Board* v. *Brown*, 380 U.S. 278-291 (1965); *American Shipbuilding Co.* v. *National Labor Relations Board*, 380 U.S. 300, 318 (1965).

[61] The cases cited by the Board in support of the proposition that the meaning given a statutory term by the agency charged with its enforcement will be respected by the courts (C.A.B. Br., p. 23), and the cases cited by the Supplementals for a similar proposition (Supp. Br., p. 35 *et seq.*) are of no aid to them here.

For instance, the Board's quotation from *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968), shows that this Court there recognized that a determination which "lacks reasonable support in rela-

statutory construction, has repeatedly stated that where Congress has expressed a limitation, it is not for an administrative agency to rewrite the law. Thus, this Court, in determining that the Federal Trade Commission had acted beyond its power, in *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643 (1931), pointed out (283 U.S. at 649):

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers. . . ."[62]

If the time has come for reevaluation of the basic scope of the Supplementals' authority, as petitioners seem to contend (C. A. B. Br., p. 27; Supp. Br., p. 42), Congress and not the Board must reevaluate. This precise problem came up in *National Labor Relations Board* v. *Insurance*

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tion to the statutory purposes" will be set aside. In *National Labor Relations Board* v. *Coca Cola Bottling Co.*, 350 U.S. 264 (1956), the Court found that the Board's determination was "a reasonable, if indeed not a compelling, construction of the statute" (350 U.S. 269)—not the situation here. In *Gray* v. *Powell*, 314 U.S. 402, 411-413 (1941), a question of fact finding was involved. In *Udall* v. *Tallman*, 380 U.S. 1 (1965), there was "no statutory limitation involved" (380 U.S. at 17); an executive order was involved. The Secretary's interpretation of the order had been in effect for fourteen years before the final decision of the Secretary from which appeal was taken, and many persons had relied thereon throughout this period. On this basis, the Court concluded that if the Secretary's interpretation was "not unreasonable," it should be sustained. *Securities and Exchange Commission* v. *New England Electric System*, Slip Op. No. 305 (October Term, 1967), 36 U.S.L. Week 4190 (March 5, 1968), did not involve a question of statutory interpretation (see Slip Op. page 3).

[62] See also *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946); *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha RR Co.*, 163 U.S. 321 (1896).

Agents International Union, 361 U.S. 477 (1960), which involved construction of section 8(b)(3) of the National Labor Relations Act. This Court determined that the Board had exceeded its authority, and that it had moved "into a new area of regulation which Congress had not committed to it" (361 U.S. at 499). It pointed out that a reevaluation "is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country" (361 U.S. at 500).

This is the rule by which the Board must abide. Any rule by which the Board would be permitted to exceed its grant of power by the adoption of regulations designed to meet difficulties Congress supposed existed would simply transfer the legislative function to an administrative agency.

C. *The Petitioners' Reliance on Motor Carrier Cases Is Misplaced.*

Petitioners rely heavily on precedent under the Motor Carrier Act (49 Stat. 552). That reliance is misplaced for a number of reasons.

1. The Board itself has recognized that "regulatory concepts under the Interstate Commerce Act are not to be imported uncritically into the Aviation Act." Appendix A to Order E-23350 (868a). Indeed, the legislative history makes amply clear that the common law definition of charter is not utilized in air transportation, *supra,* pp. 24, 31-32, 34-36.

2. The 1962 amendment authorizes a separate class of carriers with authority limited to charter operations, the

Supplementals, and provides that carriers holding certificates under other provisions of the Act may not receive certificates as Supplementals (49 U. S. C. §401(d)(3)). In contrast, in enacting the Motor Carrier Act, Congress did not divide common carriers into two classes, one authorized to engage in individually ticketed travel, special service and charter transportation and the other limited to charter transportation. Congress authorized the issuance of certificates of convenience and necessity to common carriers of passengers by motor vehicle to engage in individually ticketed travel over regular routes, "to engage in special or charter operations" or to engage in both. 49 U. S. C. §307(a).[88]

3. Further evidence of the difference in the legislative scheme of the two acts is reflected by their legislative histories. As pointed out in *National Bus Traffic Association* v. *United States*, 143 F. Supp. 689, 696 (D. N. J. 1956), affd. 352 U. S. 1020 (1957), under the Motor Carrier Act there was a complete absence of any legislative history evidencing an intention to prohibit travel agents from operating all-expense tours, whereas this was a matter of specific concern to Congress in the legislative history of the 1962 amendment.

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[88] In *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 717 (S.D.N.Y. 1941), it is stated that typically a carrier engaging in special operations "advertises a special excursion and solicits individuals to purchase tickets", while in contrast in a charter "the carrier is not the instigator of the trip, but merely negotiates with a group which is already formed." Generally speaking there is no need under the Motor Carrier Act to distinguish between special and charter operations. This was pointed out in *National Bus Traffic Association* v. *United States*, 143 F. Supp. 689, 692 (1956), affirmed 352 U.S. 1020 (1957), where it was stated it was not necessary to discuss the difference between "charter" and "special" in order to decide the case at bar.

4. The Motor Carrier precedents relied on demonstrate that the inclusive tours authorized by the Board here would not constitute a valid charter or special service under that act. In *Greyhound Corp.* v. *Edwards,* 100 M. C. C. 453 (1966), the Interstate Commerce Commission held that one-day tours arranged by a travel agent for shopping or gambling were not bona fide operations because the group lacked any community of interest beyond the desire for transportation to and from a given point.[64] The Commission declared that for a "tour group to have a community of interest the trip or tour arranged by the broker must include participation by the group members in some recognizable, previously arranged and agreed-upon group activity" such as "sightseeing or attendance at a social function, athletic contest, dramatic presentation, cultural event, religious service, or the like" (100 M. C. C. at 464). Similarly, in contrast with the tours authorized by the Board in the present case, the tours approved in the *Tauck Tours* case were guided, all-expense tours on which the group traveled together and shared accommodations and pleasures. *Tauck Tours, Inc.,* 54 M. C. C. 291, 302 (1952), 63 M. C. C. 493 (1955), affd. *sub nom., National Bus Traffic Association* v. *United States,* 143 F. Supp. 689 (D. N. J. 1956), affd. 352 U. S. 1020 (1957).

What is more, in *National Bus Traffic Association* the court stressed the conditions imposed by the Commission upon the applicant broker's use of charters, including one that the contract be between the carrier furnishing the motor transportation and "the group members collectively".

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[64] The so-called gambling trips held unlawful did not require joint activity unlike the bingo tours which did.

In distinguishing special and charter services it described charter services as follows (143 F. Supp. at 692):

> "Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who *collectively* contract for the exclusive use of certain equipment for the duration of a particular trip or tour." (Emphasis supplied.)

In the inclusive tours authorized by the Board, the "group" assembled by the travel agent does not "collectively contract" with the Supplemental for the use of the aircraft. Consequently, inclusive tours would not be charters even under the Motor Carrier Act. If they are "special services" the Board has no authority to authorize them. The Federal Aviation Act, as the Motor Carrier Act, does recognize that there are both charters and other "special services" since air carriers, other than Supplementals, are authorized to perform "charter trips or any other special service" without regard to the points named in their certificates (Sec. 401(e)(6)). The 1962 amendment, however, gives the Board power to authorize the Supplementals to engage only in charter operations. The Board cannot authorize them to engage in other special services as the Interstate Commerce Commission can authorize motor carriers.[65]

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[65] The Supplementals had previously recognized the importance to them of obtaining authority to conduct special services and had attempted to obtain this authority from the Board. Although the Board's Examiners had recommended granting them authority for limited special service flights, the Board refused to grant such authority (*supra*, pp. 10-11).

D. *Economic Advantages to the Supplementals Cannot Justify Disregard of the 1962 Amendment.*

The Board and the Supplementals seem to argue that the power conferred on the Board by the 1962 amendment can be expanded by what they claim to be the overall purpose of the statute—to improve the economic well-being of the Supplementals (C.A.B. Br., p. 6, Supp. Br., p. 31).

Respondents, of course, do not question that one of the purposes of the 1962 amendment, as the court below noted, was "to assure their [the Supplementals'] economic viability" (380 F. 2d at 777 (1132a)). But as both the court below and the District of Columbia Court also recognized, a principal purpose of the 1962 amendment was "to maintain the regulatory scheme of the Federal Aviation Act and the protection of the certificated carriers, such as petitioners [respondents] by eliminating unregulated individually ticketed point-to-point competition from the supplementals" (*ibid.*; 365 F. 2d at 944-945). Nothing in the statute or its legislative history supports an argument that the Board is empowered to do everything that will help the Supplementals economically, even if it runs counter to another purpose of the statute—that Supplementals should not be permitted to operate individually ticketed services but should be confined to charter operations which do not include individually ticketed services under the guise of "inclusive tours".

What the Board and Supplementals are really arguing is that economic advantages that might accrue to the Supplementals, if they were given free rein to solicit and ticket individual members of the general public to use their inclusive tour services, would justify this Court in disregarding the policy decision made by Congress and substitute one made by the Board.

II.

The Board unlawfully deprived respondents of a hearing in the reopened Transatlantic Charter Investigation.

The Board in the *Reopened Transatlantic Charter Investigation* amended the previously approved certificates of two Supplementals, which had become final.[66] The certificates had not permitted these Supplementals to carry inclusive tours. The amendments authorized them to do so. The Board, at the same time, and relying on the order granting such amendments, also issued new certificates in the transatlantic area to other Supplementals permitting them to carry inclusive tours (Order No. E-24242, 1097a-1106a).

These actions were taken without holding a hearing on whether the outstanding certificates should be so amended or the new certificates should include inclusive tour authority, and so were a violation of the Act and the Fifth Amendment. The Board, moreover, reversed its prior decision denying such authority without giving respondents the opportunity to meet unspecified new data relied upon by the Board and still undisclosed in the order set aside (Order No. E-24240, 1060a-1082a).

The Act requires the Board to hold hearings before granting, altering, amending or modifying any certificates (49 U.S.C. § 1371). Title 5 of the United States Code, Section 554, sets forth the requirements for a hearing where,

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[66] The Board's suggestion that the previously approved certificates had not become final is refuted by its statement on the face of each, "Issuance of this certificate to the holder approved by the President of the United States on February 18, 1964" (783a, 786a).

as here, the matter is "required by statute to be determined on the record after agency hearing" (5 U.S.C. § 554).[67]

A. *The Board Illegally Amended Certificates Without a Hearing.*

The Board, in ignoring the statutory requirements before amending the two Supplemental certificates, said it relied on the hearings held before the certificates were issued, although on the evidence adduced at those hearings it had denied inclusive tour authority.

In *Delta Air Lines, Inc.* v. *Civil Aeronautics,* 367 U.S. 318 (1961), the Board, as here, relied on an earlier record to avoid the hearing requirement. It summarily modified the terms of Delta's certificate without notice and hearing, on a petition for reconsideration filed before the certificate had become effective. The Board thought it could do so because at the time it permitted the certificate to become effective, it had stated that approval did not foreclose "the Board from full and complete consideration of the pending petitions for reconsideration of their merits" (280 F.2d 43, 45, n. 4).

As it does here (C.A.B. Br., p. 34), the Board argued there (367 U.S. at 331):

> "respondent 'in substance' enjoyed the hearing contemplated by § 401 (g) because the matters impelling the Board to change its mind were matters that had been thrashed out during the hearings on the original certificate."

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[67] Formerly Section 7 of the Administrative Procedure Act.

This Court held this (367 U.S. at 331)

> ". . . assumes a fact that we do not have before us—that a hearing would not have disclosed any further evidence or, perhaps more importantly, any post-certification events weighty enough to alter the Board's thinking."

It pointed out that the language of Section 401(g) of the Act "represents to us an attempt by Congress to give the Board comprehensive instructions to meet all contingencies." (367 U.S. at 323).

The Court concluded that the hearing requirements of the statute had not been met by this procedure. It went even further (367 U.S. at 332).

> "It might be added that some authorities have felt strongly enough about the practical significance of this practice to suggest that their presence may be required by the Fifth Amendment."

As in *Delta*, the Board relied here on proceedings held sometime earlier—four years earlier. The Board contends here it went further than in *Delta* and relied also on post-certification data that justified reversal of its earlier decision that the certificates in question should not authorize inclusive tours. But respondents here were given no opportunity to meet that new data and did not even know about it until the Board's opinion disclosed its action without specifying "the other data" which changed the Board's mind. As will be shown *infra* (pp. 77-79), this only aggravates the error.

B. *The Board Did Not Meet the Hearing Requirements of the Act Before Granting Inclusive Tour Authority in New Certificates.*

The Board included in the newly granted certificates of the Supplementals authorized to engage in transatlantic operations[68] the right to carry inclusive tours without any hearing on that issue. It simply relied on its order amending the certificates of two Supplementals discussed above.

That order, in turn, was said to be based on hearings held before the alleged change in conditions upon which the Board based its reversal, and on officially noticed data. Those earlier hearings, on the basis of which inclusive tour authority had been denied,[69] cannot constitute a hearing according with the requirements of the Act. *Delta, supra,* makes clear that a hearing must be adequate. So does *Trans World Airlines, Inc.* v. *Civil Aeronautics Board,* 339 F.2d 56 (2 Cir. 1964), cert. den., *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 382 U.S. 842 (1965), in which the Court of Appeals held that the "investigation and findings [of the Board] preceding its previous orders" were no substitutes for the hearing required and remanded the matter to the Board for a further hearing. And in *Morgan* v. *United States,* 304 U.S. 1, 18-19, 20 (1938), this Court recognized:

> "The right to a hearing embraces not only the right to present evidence but also reasonable opportunity to know the claims of the opposing party and to meet them."

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[68] American Flyers Airline Corp., Overseas National Airways, Inc., Trans International Airlines, Inc., World Airways, Inc.

[69] In those original proceedings, two of the Supplementals who were granted certificates in the *Reopened Transatlantic Charter Investigation,* Trans International Airlines, Inc. and American Flyers Airline Corp., were not even applicants.

The requirement for an adequate hearing is clearly not met where the Board relies on a hearing held years earlier, particularly when the Board bases its decision on a subsequent change in circumstances to reverse its contrary decision resulting from the earlier hearing.

C. *The Board Was Required to Give Petitioners the Opportunity to Meet New Data the Board Relied On.*

The Board also sought to support the orders reversing its earlier decision on the basis of "official notice" of unspecified "Form 41 reports and other data".

"Official notice" is no substitute for the hearing required by the Act. As pointed out long ago by this Court in *United States* v. *Abilene & Southern Railway Co.*, 265 U.S. 274, 289 (1924), regulations authorizing an administrative agency to take notice of certain documents in its files do not "purport to relieve" the agency from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence. There is very good reason for this requirement, as Justice Brandeis explained on behalf of the unanimous Court (265 U.S. 289):

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference is made, is essential to the preservation of the substantial rights of the parties."

See also *Interstate Commerce Commission* v. *Louisville & Nashville RR Co.*, 227 U.S. 88, 93 (1913); *Ohio Bell Tele-*

phone Co. v. *Public Utilities Commission of Ohio,* 301 U.S. 292, 301-302 (1937).

The opportunity to know and to rebut damaging evidence goes to the heart of the controversy and lack of such opportunity vitiates the whole proceeding. See *e.g., DeGraw* v. *Toon,* 151 F.2d 778, 780 (2 Cir. 1945).

The Board's own regulations, indeed, recognize the need to prevent such a violation of the statute and due process (14 CFR § 302.24(m)(3)):

> ". . . where the decision rests on official notice of a material fact or facts, it [the Board] will set forth such items with sufficient particularity to advise interested persons of the matters which have been noticed."

Yet not one of the Board's own requirements was complied with here. The Board simply stated that it relied on "Form 41 reports and other data of which we may take official notice." The Board did not specify the portions of the reports and the other data noticed. This clearly is not sufficient notice, especially where the regulations provide that the Board may take official notice of 42 broad categories of documents, as well as "other matters or documents properly the subject of official notice" (14 CFR § 302.24 (m)(1)). Certainly, "facts conceivably known to the commission but not put in evidence will not support an order," *The Chicago Junction Case,* 264 U.S. 258, 263 (1924).

This Court should not accept the Board's assurance that respondents could have done nothing in a hearing which would have altered the result the Board reached. A court should not be required to try to apprise itself of the nature of off-the-record evidence to determine whether a party

may be able to rebut it by evidence of its own. See *e.g.*, *Deep South Broadcasting Co.* v. *Federal Communications Commission*, 347 F.2d 459, 463 (D.C. Cir. 1965); *W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission*, 237 F.2d 552, 556 (D.C. Cir. 1956).

What the Board did here is precisely what it did in *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 345 F.2d 484 (1 Cir. 1965), cert. den. *sub nom. Eastern Airlines, Inc.* v. *Northeast Airlines, Inc.*, 382 U.S. 845 (1965). In *Northeast* the Board sought to overcome the requirements of a hearing by taking official notice of "reports filed by the carriers since the formal closing of the evidentiary record and other stipulated materials" (345 F.2d at 845). It then "rendered a new and, what it terms 'complete recast' of its decision" (345 F.2d at 485). The Court of Appeals held (345 F.2d at 487):

> "Having opened the door to new data, the Board was obliged to take a full look."

As it had previously observed (345 F.2d at 486):

> "It is to us crystal clear that as soon as it elected to look at such matters it could not pick and choose, at least to the extent of denying an objecting party the rights guaranteed, but by no means created, by section 7(d) to rebut not only those matters it looked to, but also the inferences which were sought to be drawn therefrom. Due process could permit no less."

Respondents urged these requirements before the Board, but the Board refused to afford any hearing. The Board's action is a violation of the Act, Title 5 of the United States Code, and is a denial of due process.

D. *Petitioners' Attempt to Prevent Adjudication of the Board's Failure to Meet Procedural Requirements.*

The Supplementals and the Board contend that the issues raised may not be considered because: (1) there was no prejudice since the Board relied on respondents' own reports (C.A.B. Br. p. 35); (2) the objections were first raised in the court below (Supp. Br. p. 56); (3) no request was made for specification of the additional data relied upon (C.A.B. Br. p. 35); (4) respondents "failed to specify in their briefs below the alleged controversial errors committed by the Board or the contrary evidentiary showing that respondents would have been prepared to make" (C.A.B. Br. p. 35; Supp. Br. p. 56).

1. The Board's present claim that it relied on respondents' own reports is its *post hoc* conclusion as to what was relied upon. The Board's order simply refers to "Form 41 reports and other data of which we may take official notice" (*supra,* p. 7)—no specification is made. Even had the Board relied only on respondents' own reports, petitioners may have been prejudiced by the use of such material without the right to explain it, as this Court has pointed out in the cases cited *supra,* pp. 77-79.

2. Respondents did object to the Board's procedure before the Board, arguing that they were entitled to a new hearing before inclusive tour authority could be approved in the transatlantic area (963a-967a, 968a-975a). This right was sought so that, among other things, respondents could counteract any material of which the Board might take official notice. (See brief to the Board, p. 970a). The Board rejected respondents' request.

3. The Board having rejected this request, any attempt to obtain specification from the Board would merely have further delayed the already protracted proceedings without giving respondents any opportunity to refute the Board's data. Petitioners cannot bar respondents' right under the provisions of section 1006(e) of the Act (49 USC § 1486(e)) because the Board's attention had already been called to its error and the Board nevertheless persisted in the error.

4. Respondents not only spelled out in their brief to the Board the prejudicial errors committed by the Board but also specified the type of information they contended must be considered before inclusive tour authority, if lawful, could be authorized in the transatlantic area (972a-975a). They pointed out that information concerning the following should be obtained: (1) Possible international problems, such as landing rights (972a) and the effect on United States balance of payments (974a); (2) evidence on the question of "how, when and where the travel agent, as the principal who would organize, promote and sell these tours to the public, is to offer and sell this service" (974a); (3) evidence on the "continued reductions in fares on scheduled services, and the adverse effect of that continuing trend (and on the well-being of the scheduled carriers) of the massive diversion threatened by authorizing supplemental air carriers to provide all-expense tours" (966a); and (4) evidence on the high profits and financial condition of the Supplementals (966a). All this was also pointed out in respondents' reply brief in the court below.

III.

The orders challenged are subject to review although approved by the President.

The Supplementals raise as a question "[w]hether under the doctrine of *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, the Board's orders were reviewable only by the President and not by the courts" (Supp. Br. p. 2), although they do not argue this point.

The Board concedes that under constructions of *Waterman* adopted by the lower courts without objection by the Government, the Board's power to enter an order subject to Presidential approval is reviewable by the courts (C.A.B. Br., p. 31, n. 48). The Board, however, distinguishes between judicial review of its power to enter such an order and judicial review of procedural errors in such an order. Nevertheless, it does not argue *Waterman* (*ibid.*, p. 32).

Waterman did not involve a question as to the Board's power or a question as to the adequacy of hearings. The sole issue was the correctness of the Board's findings and the adequacy of the evidence underlying them. The challenge here is not to these matters but to the Board's authority and to the regularity of the proceedings below.

The lower courts have held *Waterman* should not be extended to questions of the Board's authority and in doing so have acted with the approval of the Board and the Department of Justice (cf. C. A. B., Br. p. 31, n. 48). Thus, in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349 (D. C. Cir. 1965), the District of Columbia Court acted on the recommendation of the Board

in reaching its conclusion that *Waterman* should not preclude review of the Board's authority.

The Board and the Department of Justice in their joint brief to the Court of Appeals there had stated:

> "The government's position is that review of orders approved by the President may be had on the limited question of whether the President and the Board have exceeded their constitutional and statutory authority. See *Alaska Airlines, Inc.* v. *Pan American World Airways, Inc.*, 116 U.S. App. D.C. 128, 321 F.2d 394 (1963); *British Overseas Airways Corp.* v. *Civil Aeronautics Board*, 113 U.S. App. D.C. 76, 304 F.2d 952 (1962)."

Clearly, the Board and the Department of Justice are correct when they concede that the question of statutory power to authorize inclusive tours is reviewable. They do not explain how they distinguish the statutory power question involved in the inclusive tour issue from that involved in the hearing issue. Not only does the hearing issue involve a statutory question, it involves a constitutional one as well.

While the Supplementals state that there is no occasion now to re-examine the scope of *Waterman*, they characterize the *Waterman* decision as holding that orders involving international operations are not subject to judicial review "essentially because they involve foreign affairs, an area in which the President alone could speak for the Nation", thus implying that *Waterman* would bar any review, even of the question of statutory authority (Supp. Br. p. 55).

Any claim that *Waterman* would bar review here must be based upon some such broad grounds for Congress

clearly has not precluded judicial review.[10] Section 801 of the Act requires Presidential approval of orders involving foreign air transportation, which is involved here. But Section 1006 does not bar judicial review of such orders. Section 1006 is explicit. It provides, in pertinent part:

> "Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review. . . ."

The Supplementals are, of course, "air carriers", not "foreign air carriers", who are not United States citizens.

The difference between Section 801 and Section 1006 is no accident. As originally drafted, H.R. 9738, the bill first introduced into the House on January 3, 1938, would have precluded judicial review of any order involving "foreign air transportation" (see Sections 303(a) and 504). "Foreign air transportation" includes operations by United States airlines to foreign countries. As the bill evolved in committee the provision was changed and by April 6, 1938 judicial review of an order involving foreign air transportation, other than by a foreign air carrier, was not prohibited (Sections 801, 1005). The legislative history of these sections in the Senate was parallel to that in the House.[11]

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[10] The first question is, of course, whether Congress intended to forbid review, since "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); see also *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963).

[11] Thus, the original Senate bill introduced on April 14, 1938 would, on its face, have precluded judicial review here (see Sections

The basis, then, if any, for barring judicial review here would have to be found in the Constitution.

The fact that foreign air transportation is involved here does not, *ipso facto*, bar review, especially without regard to the question being reviewed. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423, 428, 439, 461-2 (1964); *Baker* v. *Carr*, 369 U.S. 186, 211-212 (1962).

Certainly the concession of the Board and the Department of Justice here that review of the power of the Board is not barred by *Waterman* indicates that foreign policy considerations of a Presidential nature are not here involved.

In any event, the questions of statutory or constitutional construction involved here are questions for the courts to decide. There are no matters requiring exercise of executive discretion or judgment on which the decision of the President on foreign affairs is required.

Where, as here, executive action is founded on an act of Congress, it is the right and duty of this Court to consider whether the executive has acted in accordance with the requirements of that Act. *Cole* v. *Young*, 351 U.S. 536 (1956); *Kent* v. *Dulles*, 357 U.S. 116 (1958). This rule has been followed even though the President and questions involving foreign affairs, national defense or national security are in some way involved in the alleged illegal action. *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1962); *Estep* v. *United States*, 327 U.S. 114 (1946).

801, 1006(a)). But the committee print introduced a few days later changed the pattern and provision was made for judicial review of orders involving foreign air transportation except those relating to foreign air carriers (Sections 801, 1005).

Thus the action here allegedly taken on the basis of a statutory grant and in derogation thereof is subject to judicial review.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD R. NEAHER
Counsel for Respondents

CARL S. ROWE
GERTRUDE S. ROSENTHAL
CHADBOURNE, PARKE, WHITESIDE & WOLFF
New York, New York
Of Counsel

Dated: April 15, 1968